

IN THE  
**United States Court of Appeals  
for the Ninth Circuit**

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**WM. T. ALVARADO SALES CO. and  
SPEE-DEE CHECKOUT SYSTEMS, INC.,**

**Appellants,**

**vs.**

**SIDNEY S. RUBALOFF and ABRAHAM M. GROSS,  
individually and doing business as  
CHECK-A-MATIC CO.,**

**Appellees**

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**WM. T. ALVARADO SALES CO. and  
SPEE-DEE CHECKOUT SYSTEMS, INC.,**

**Appellants,**

**vs.**

**DU-MORE FIXTURE CO., INC.,**

**Appellee**

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**BRIEF FOR PLAINTIFF-APPELLANTS**

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**FILED**

**JUN 24 1958**



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## BRIEF FOR PLAINTIFF-APPELLANTS

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### STATEMENT OF JURISDICTION

This appeal is taken from the judgments of the United States District Court, Southern District of California, Central Division in two cases consolidated for trial by the District Court.

The complaint in Civil Action No. 18,910 (R. pg. 3) alleges that William T. Alvarado Sales Co. and Spee-Dee Checkout Systems, Inc., are, respectively, exclusive licensee in the State of California, and owner of United States Patent No. 2,599,909 issued June 10, 1952 to the predecessor of Spee-Dee Checkout Systems, Inc., as assignee of the inventor Will L. George. The complaint alleges acts of infringement in the judicial district of the Court by Sidney S. Rubaloff and Abraham M. Gross individually and as partners doing business as Check-A-Matic, and residence of defendants in the judicial district of the Court. Injunctive and other relief is sought under the provisions of Title 28 U. S. C., Sections 1338 and 1400 (b).

By answers filed (R. pg. 6) Sidney S. Rubaloff and Abraham M. Gross admits their residence and the jurisdiction of the District Court and the issuance of the patent in suit but deny infringement and validity of the patent. Note: Separate answers were filed by Sidney S. Rubaloff and Abraham M. Gross but they are identical and only one is reproduced in the printed record.

The amended complaint in Civil Action No. 19618 (R. pg. 14) alleges the same complaint by the same parties plaintiff against Du-More Fixture Co., Inc. and requests the same relief under the same statutes.

By answer filed (R. pg. 17) the defendant Du-More Fixture Co., Inc. admits its residence and the jurisdiction of the Court and the issuance of the patent but denies infringement and validity of the patent. A counterclaim seeking declaratory judgment of invalidity of the George patent in suit was interposed by the party Du-More Fixture Co., Inc. and issue on the counter-claim was joined.

The claims charged to be infringed in both cases are claims 3, 5, 6 and 7 of the George patent No. 2,599,909.



## STATEMENT OF THE CASE

These cases raise the traditional issues of a patent infringement case. Issues of ownership of the patent and jurisdiction of the District Court have been resolved. Manufacture and sale of the accused devices have been admitted and the sole remaining issues are the validity of the patent in suit and the infringing character of the accused devices.

The District Court, in a five line minute order, (R. pg. 25) rendered judgment for defendants, appellees, and rendered the opinion here quoted *in toto*:

“The Court is of the opinion that the patent in suit is invalid because of prior art and that the claims of the patent are not invention.”

Under the local rules of the District Court defendant appellees submitted formal findings of fact, conclusions of law and judgments (R. pgs. 26 and 31) and these were adopted by the District Court and the judgments entered on December 10, 1957.

These judgments raise the questions of improper application of recognized rules and tests, legal and factual, of the validity of the patent in suit. As will be pointed out, the facts disclosed by the record not only do not support the finding of invalidity of the George patent in suit but affirmatively require findings of validity and infringement and appropriate judgments thereon. The factual evidence of the physical structures and modes of operation of the patented device and the accused devices is complete and not seriously controverted in any respect. In situations of this kind, this Court has found it proper to decide the question of infringement *Muench-Kreuzer Candle Co. v. Wilson*, 246 F. 2d 624, headnote 9.

## SPECIFICATION OF ERRORS

1. The trial Court failed to recognize and take into account the *admitted* novelty of the patented device.
2. The trial Court failed to recognize and take into account the *admitted* insufficiency of the prior art to teach or suggest the combination of elements in the patented device.
3. The trial Court failed to recognize and take into account the *uncontroverted* evidence of novel coaction between the elements of the patented device.
4. The trial court failed to recognize and take into account the *admitted* utility and improved action of the patented device.
5. The trial Court failed to recognize and take into account the fact that the overall result or function of the patented device is more than the sum of the functions of its several parts, considered separately.
6. The trial Court failed to recognize and take into account the *admitted* fact that the accused devices utilize the same concept of operation as the patented device for the same purpose as the patented device.
7. The trial Court failed to recognize and take into account the *admitted* fact that the prior art cited by appellees against the patent in suit did not show anything new or different from the prior art considered by the Patent Office before allowing the patent.
8. The trial Court failed to recognize and take into account the fact that the accused devices each included all of the elements defined by one or more claims of the patent in suit.

9. The trial Court failed to recognize and consider the *uncontroverted* evidence of commercial success of the patent in suit and the tribute paid the invention by defendant appellees in copying the device of the patent.

10. The trial Court failed to consider that the patent in suit is presumed to be valid. U. S. C., Title 35, Sec. 282.

11. The trial Court failed to consider that the problem solved by the patent in suit had long been recognized by trade and that in spite of this no one prior to the patentee had been able to conceive or devise the simple solution thereof as disclosed by the patentee.

12. With reference to the findings of fact, conclusions of law and judgment in CA No. 18,910-HW, Check-A-Matic:

A. There is no evidence to support finding 7 (R. pg. 28) that each and every one of the individual components of the claimed invention and of the claims thereof were all well known in the prior art prior to the application for the patent in suit.

B. There is no evidence to support finding 8 (R. pg. 28) that each claim is a non-patentable aggregation, makes no improvement in the art and provides no function or interaction of parts or novel and unexpected consequences.

C. There is no evidence to support finding 9 (R. pg. 29) that the functions of the various components of the disclosed invention are no different from the functions of the same components in the prior art and that there is no new relationship and coaction between the components.

D. There is no evidence to support finding 10 (R. pg. 29) that the difference between the invention and the prior art was obvious at the time of the invention to persons having ordinary skill in the art.

E. The above findings of fact being in error, conclusions of law 2 and 3 (R. pg. 30) are unsupported and in error and the judgment entered thereon is in error.

13. With reference to the findings of fact, conclusions of law, and judgment in C. A. No. 19618-HW, Du-More; findings of fact 7, 8, 9 and 10, (R. pg. 32) and conclusions of law 2 and 3 being identical in substance to the same findings in CA No. 18910-HW are in error for the same reasons pointed out in paragraph 12 above and the judgment entered thereon is in error.

## ARGUMENT OF THE CASE

### Summary

This appeal involves the validity of the George patent in suit. The evidentiary facts are not seriously in dispute and the question of infringement should also be considered to determine the scope of the patent and prevent undue delay in settling the rights of the parties and the public with respect thereto. At least, the degree and extent to which defendant appellees copied appellants' structure and utilized the essential concepts of the patent in suit must be considered as indicating appellees' opinion of the utility and desirability of the structure of the patent. *Patterson-Ballagh v. Moss*, 201 F. 2d 403.

The patent in suit is on a checkstand for self service stores such as "supermarkets". The patent relates to the art considered in *A & P v. Supermarket*, 340 U. S. 147, and this case is recognized as pertinent. It also makes it a matter of judicial record that the problem solved by the patentee had existed long prior to application for the patent in suit.

The argument first points out the structure and mode of operation of the patent in suit. The claims in suit are analyzed to point out the scope and definition of the invention. The novel interrelation and coaction of the parts in advancing the articles of a customer's grocery purchase transversely of the counter, always to the same position closely alongside of a cash register supported over a sector of a rotatable receiving table is then pointed out. The pertinent features of the prior art are explained and reference made to points in the record where it is admitted that the prior art does not suggest the combination of the patented structure or disclose its novel features. The advantages and improved results achieved by the patented structure in bringing all the articles of a grocery purchase into the same position within easy reach and clear view of the store checker are then elaborated. Additional resulting advantages of greater checking accuracy in preventing the theft or missing of individual articles and greater convenience to the retail customer are elaborated. The structures and modes of operation of the accused devices are described and compared with the claims and structure of the patent in suit to show how the accused devices support a cash register over a sector of a rotatable receiving table and alongside of a stop across the table so that articles are advanced transversely with respect to the checkstand always to the same position for ease in checking and removal to a discharge counter in the same way as in the patented structure. The legal implications of the evidentiary facts are analyzed, with authorities, to point out wherein all of the factors such as novelty, utility, new coaction of parts and lack of anticipation commonly recognized as supporting a finding of validity and infringement are present in this case. The argument concludes with a statement of the facts and conclusions as they should have been found by the Trial Court.



### The Patented Structure

The structure of the patent in suit is not complex. Sheet 1 of the drawings of the patent is reproduced on the opposite page for convenience and using *claim 6* of the patent as a pattern the structure comprises:

- (a) A rotatable receiving table, 6,
- (b) a stationary guard rail (unnumbered) for a substantial portion of the rim of said receiving table,
- (c) a discharge counter, 5, disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter,
- (d) means (27, 28, 29) forming a stop for articles on the receiving table and a register support disposed above the plane of said receiving table at the side of said stop,
- (e) and means (a motor concealed within the base of the stand) for rotating said receiving table. (The switch 24 controls the motor)

A comparison of the above quoted claim 6 with the other claims charged to be infringed points out the scope of the invention as allowed by the Patent Office. The claims should be compared in interpreting their meaning. *Jacuzzi Bros. v. Berkley Pump*, Dist. C. N. D. Cal. 90 Fed. Supp. 238; and *Western States Machine Co. v. S. S. Hepworth*, (C. A. 2) 147 F. 2d 345:

Claim 3 calls for:

- (a) A checking stand for a grocery store and the like comprising a register support panel (28) having a stop portion 29 along one edge thereof,

June 10, 1952

W. L. GEORGE

2,599,909

CHECK STAND FOR GROCERY STORES AND THE LIKE

Filed Sept. 15, 1947

2 SHEETS—SHEET 1

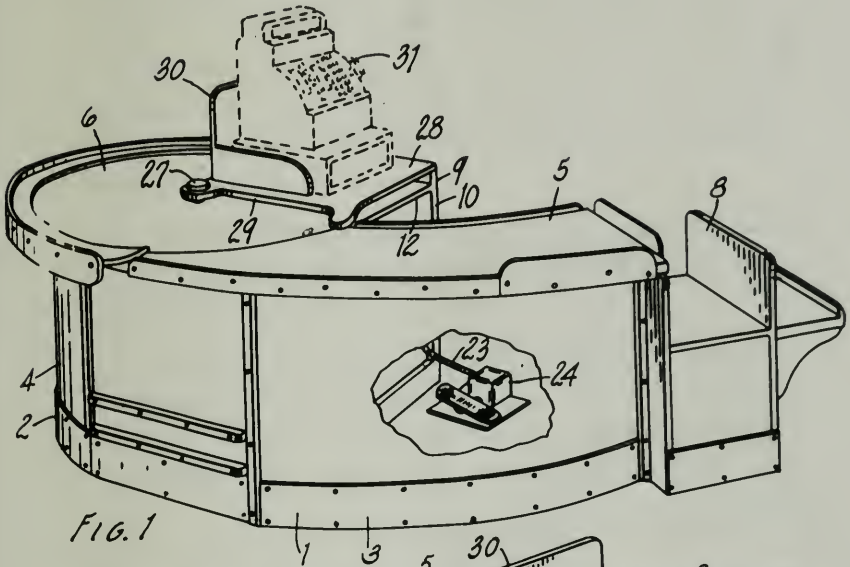


FIG. 1

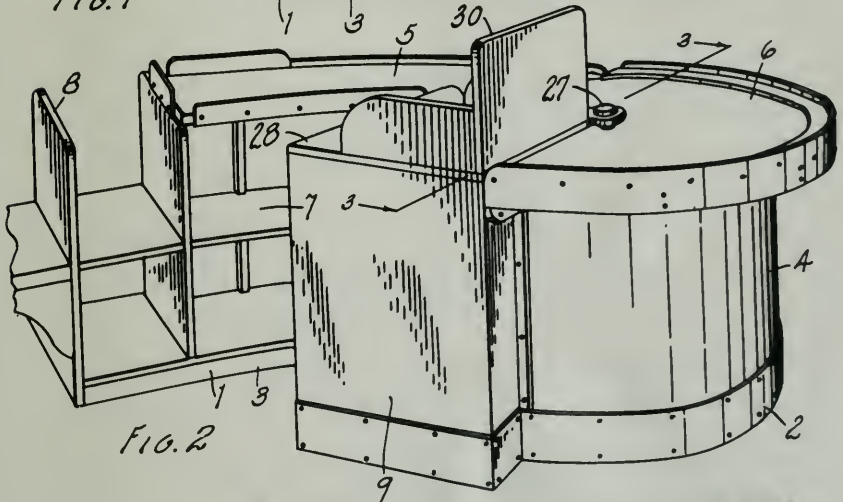


FIG. 2

INVENTOR  
William L. George  
BY

O. L. East  
Attorney.





(b) a turntable (6) mounted to rotate partially underneath said panel whereby articles placed on said turntable will be carried thereby against said stop portion (29),

(c) a discharge counter (5) extending from said turntable (6) adjacent to said support panel (28),

(d) the end of said discharge counter extending from said stop portion (29) accurately away therefrom for a substantial distance along the periphery of said turntable (6),

(e) said discharge counter extending longitudinally from said end (d. above) with its inner edge concavely arcuate with respect to said support panel,

(f) a guard ring (unnumbered) around the exposed edge of said turntable and extending inwardly over the outer edge of said discharge counter (5) to direct items on said table (6) toward said stop portion (29).

(g) a motor (21, Fig. 3) for rotating said turntable (6),

(h) and means (24) for controlling said motor located behind said discharge counter (5) for operation by the operator of said stand.

Claim 5 calls for:

(a) A checking stand for self-service stores comprising a base (1-4),

(b) a turntable (6) rotatably mounted above part of said base,

(c) a discharge counter (5) supported above the remainder of said base and extending as a continua-

tion from a portion of the periphery of said turntable (6),

(d) a register support panel (28) supported above a quadrant of said turntable (6) adjacent to said counter (5) whereby said turntable (6) will rotate freely in closely spaced relation underneath said support panel (28),

(e) a motor (21) for rotating said turntable (6),

(f) and a switch (24) for regulating said motor (21).

Claim 7 calls for:

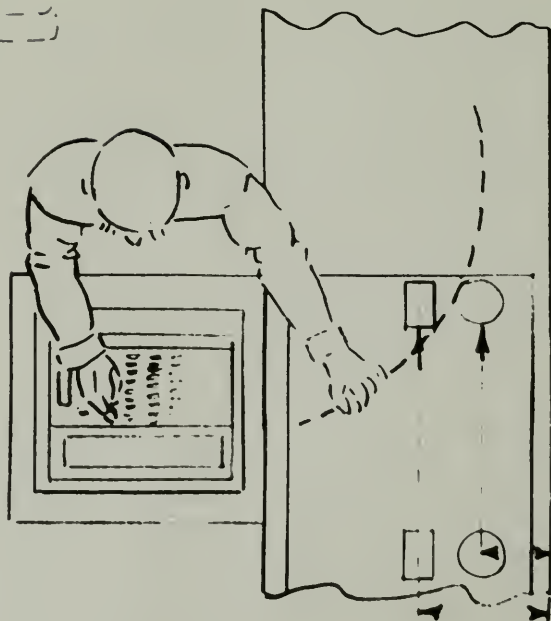
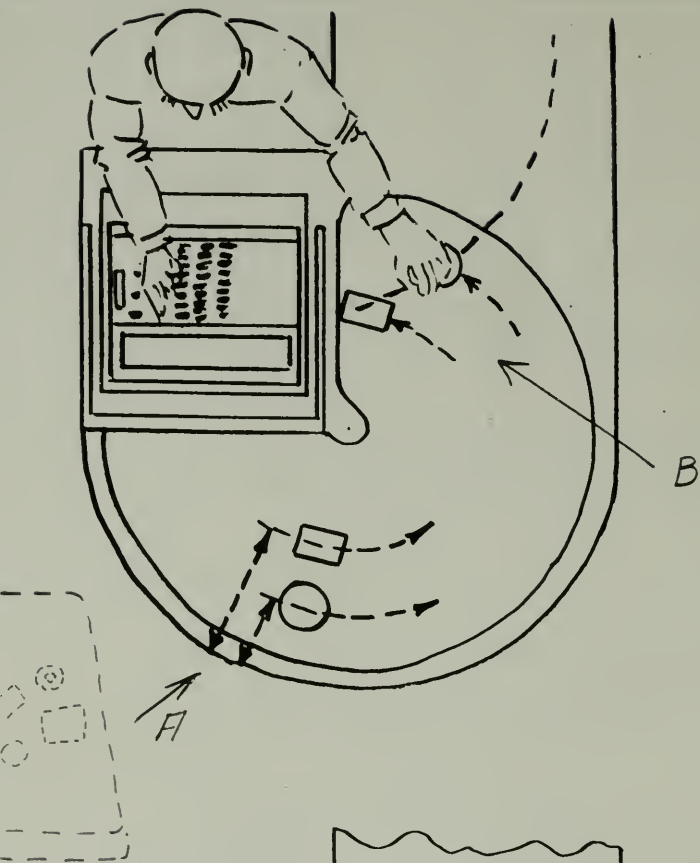
(a) A checking stand for self-service stores comprising, an item receiving counter (6) of generally circular outline mounted to rotate in the plane of its surface,

(b) a register support (28) positioned in closely spaced relation over a sector of said receiving counter (6) and having a side edge (29) extending generally radially of said receiving counter (6) to the periphery thereof to form an article stop for articles rotated thereagainst by said receiving counter (6),

(c) and a discharge counter (5) extending as a generally co-planar extension of said receiving counter (6) from another sector of said receiving counter (6) adjacent said stop (29).

The discharge counter may be curved as shown in the reproduced portion of the patent or it may be straight as shown in Fig. 4 of the patent (Pl. Ex. 3, R. pg. 251). Claims 5, 6 and 7 do not require the curve. The stop 29 for articles on the receiving table may be recessed into the panel 28 as shown and as required in claim 4 of the patent or it may extend across the rotatable receiving table in other





less specifically defined manners as set out in claims 3, 5, 6 and 7 above. The register support panel or means 28 may be located over the turntable as in claims 3, 5 and 7 or merely located above the plane of the receiving table as in claim 6 and be adapted to support a cash register as indicated at 31 over a sector of the receiving table and alongside of the stop. The stop portion 29 may be part of the register support panel 28 as defined in claims 3 and 7 or it may be a separate means as defined in claim 6, or it may be a separate part as the omission of any limitation from claim 5 indicates.

### Mode of Operation

The structure of the patent in suit is designed for use in self service stores of which combined grocery stores and meat markets commonly referred to as "super-markets" are the most familiar example. The structure of the patent is known in the trade as a checkstand and as stated as the first object in the patent its object is:

"to provide a stand for checking out the items of a customer's purchase in a grocery store or the like which will *speed up the operation* of checking each item and *reduce the possibility of error* in missing items or checking a single item twice." (Emphasis added.)

The portion of plaintiffs' Exhibit 9 reproduced on the opposite page (with explanatory notes added) clearly discloses the mode of operation and the physical action of the patented structure. Note that defendant appellees' expert acknowledged the accuracy of the original exhibit at R. pgs. 216-217. The checkstand attendant, known in the trade as a checker, stands in the corner formed by the cash register and the discharge counter in facing relation

to the cash register and what may be termed the front of the checkstand. The customer approaches the front of the checkstand and the rotatable receiving table with his or her cart of groceries and commences to place the articles of the purchase on the receiving table as indicated at A. These articles may be hidden from the checker's sight by the cash register but on seeing the customer, the checker starts the receiving table rotating, if it has not been left in rotation, in a counter-clockwise direction and this advances the articles to the position indicated at B, closely alongside the cash register. This, incidentally, makes room for additional articles of the purchase in front of the customer.

The actual operation of the checkstand varies with the preference of the checker and the amount or number of items being presented for checking. (R. pgs. 55 to 58 and the confirmation by appellees' expert at page 198.) Individual articles may be manually intercepted while moving, or the rotation of the receiving table may be stopped with the article near the side of the stop. In case the table is left rotating any article left on the table is intercepted by the stop alongside of the cash register and prevented from continued rotation. In any and each of these instances the articles are presented closely alongside the cash register in full view and easy reach of the checker for easy visual pricing and manual removal by the checker to the discharge counter. The checker operates the cash register with the right hand to record the price of each item while removing the item to the adjacent discharge counter with the left hand. *Each and every article comes around to the same line closely alongside of the cash register. The checker can depend on this and does not have to continually scan the remainder of the receiving table.*



### Novel Interrelation and Coaction of Parts of the Checkstand

The rotatable receiving table performs the functions of receiving and supporting the articles of a customer's purchase at a point remote from the checker and any preceding customer who may be paying her bill to the checker. It advances the articles always to the same convenient checking position and travels under the cash register to the front of the stand to receive additional articles.

The register support panel not only supports the cash register but supports it in the novel and particularly advantageous position shown over a sector of the receiving table where the side of the register is closely adjacent the article stop and where the rear edge of the cash register is close to the rearmost part of the receiving table so that the checker can advance and stand closely adjacent the receiving table and within easy arm's reach of articles advanced to the stop by the rotating table. The left side edge of the register support panel (as viewed by the checker) may perform the additional, and novel, function of acting as the stop for the articles of the purchase but this is not required by all claims of the patent in suit. A separate bar or stop could obviously be mounted across the receiving table closely alongside of the cash register and the side of the register support panel. (See claim 6 quoted on page 8 above in which the "means" in clause (e) may be plural means separately forming the cash register support and stop.)

The discharge counter performs the function of receiving articles advanced thereto or thereacross by the checker and coacts with the receiving table by being conformed at its forward end to the shape of the circular receiving table.

The discharge counter coacts in a novel manner with the register support panel by being positioned closely adjacent the rear corner of the register support panel so that the front of the discharge counter is within the normal swinging arm's reach of the checker while moving checked items rearwardly, and so that there is a continuous supporting surface for articles from alongside the article stop to the discharge counter. The articles can be merely pushed or swept from the checking position to the discharge counter.

The means forming the stop extending across the receiving table coacts novelly with all three of the receiving table, the register support panel and the discharge counter elements in that its position is such as to interrupt the rotary advancing motion of the articles of purchase closely alongside the cash register and immediately adjacent the discharge counter. As previously noted, this interruption at the checking position is always at the same location. When located near or against the stop, all the articles are in easy view and reach for checking and removal to the discharge counter, and further all articles of a purchase placed on the receiving table are advanced automatically to this convenient checking position. There is no chance of an article being missed or conveyed past the checker without its being checked.

### **Structure of the Patent in Suit is Commercially Successful**

While no great issue was made of the point, the Court should note at R. pg. 77 that over 1200 of one model of the checkstand were made by plaintiff appellants. Appellants' Exhibits 19, 20, 25, 26 and 31 (R. pgs. 278 to 297 and 299) indicate a fine record of commercial success of the patented structure. Appellees cannot deny the utility of the pat-



ent in view of their advertising of all its desirable features. (See appellants' Exhibits 13 and 31, R. pgs. 270 and 298) *Patterson-Ballagh v. Moss*, F. 2d 403.

### Prior Art

All inventions are tested as to their patentability by a comparison of the structure of the patent with the prior art existing at the time of filing of the patent in suit. In this case the appellees cited a number of patents in their answers but only the following patents were relied on.

Turnham	2,242,408
Bradley	2,317,438
Muse	2,237,080
Price	2,268,897
Goodrich	1,071,004
Florence	1,400,948

The patent to Wilcox, 1,664,055 was mentioned but at R. pg. 154 this was acknowledged by defendants' expert to be irrelevant. The Trench patent 756,298 was mentioned but at R. pg. 174 defendants' expert designated the Turnham, Bradley and Muse patents as being as good as any showing the combination. For the appellant, Check-A-Matic, this same expert discussed only the Turnham, Bradley and Price patents.

So far as this case is concerned the pertinent features and the presence, or absence, of relevant elements of the prior art patents are believed to be as follows:

Turnham 2,242,408 (R. pg. 416)

This patent discloses a check stand for self-service stores and is thus related to the same art as the George patent in suit. Turnham discloses an elongated counter top 3 supported upon a suitable base 2. A stand for supporting a cash register 6 is positioned behind the counter intermediate of the ends thereof *with the cash register and its stand completely off of the counter 3*. The left or front end of the counter to which the customer brings her purchases is extended beyond the cash register 6 and a U-shaped framework 20 is slidably supported on the left extension and central portion of the counter by side bars 26 and 27.

The disclosed theory of operation of the Turnham check stand was for the customer to place the articles of a purchase within the U-shaped frame 20 on the left end extension 15 of the counter after which the checker would draw the U-shaped frame and the articles rearwardly to along side of the cash register. The U-shaped frame was then returned to the end of the extension leaving an open counter space for a succeeding customer to unload her purchase while the first customer was having the articles of her purchase check out. The several articles of the purchase were deposited in *an irregular mass completely across the width* of the counter 3.

The Turnham patent shows *rectilinear motion of the articles of a purchase longitudinally along the counter* with a checking position of rest for the articles located completely across the width of the counter along side of the cash register. The motion of articles of a purchase was necessarily intermittent and there was *no provision for moving articles transversely of the counter and toward the side of the cash register* or the cash register stand. There

was no common or uniform checking spot or line which the checker could rely on. He had to continually scan the whole checking area on the counter and reach to different locations thereon.

**Bradley 2,317,438 (R. pg. 404)**

This patent discloses several mechanized forms of the Turnham check stand. The elongated counter 9 with *the cash register support stand 21 located completely off of and to the rear thereof* remains the same as the Turnham check stand. One form of the Bradley patent provides guide rails 31 along the sides of the counter and its forward extension as in Turnham but instead of a U-shaped pull frame for transferring the articles of a purchase, the counter supports a low flat carriage 33 mounted on wheels 34. Other forms of the Bradley patent shown in Figs. 7 and 10 disclose rollers 58 in the counter surface or a continuous belt 81 on the counter for advancing the articles of a purchase to the checking position along side of the cash register. In all forms of the Bradley patent *the motion of the articles of a customer's purchase remain rectilinear in a straight line along the length of the counter and there is no structure or attempt to move the articles transversely to closely along side of the cash register.* Articles placed near the front or outer side of the counter where the customer stands and unloads her shopping cart will remain on the outer edge of the counter in a position furthest removed from the position of the checker behind the cash register. As in Turnham, the checker had no assured common checking point to which all articles were advanced. He still had to scan the whole counter and reach to its furthest edge.

*Muse 2,237,080 (R. pg. 387)*

This patent discloses an elongated counter 13 with a *cash register support stand 21 positioned at the rear side of and completely off of the counter* and intermediate of the ends thereof. A continuous conveyor belt 7 extends from the front end of the counter well past the checking position at the cash register stand. The principle difference between the Muse and Bradley structures is that Muse provides a packing recess toward the rear or right end of his counter at the end of the belt 7 so that the belt can direct and discharge articles directly into a packing bag or box positioned in the recess indicated at 17.

So far as movement of the articles of a purchase from the customer unloading position in front of the cash register to the checking position along side of the cash register is concerned *the Muse check stand functions in the same manner as the Bradley and Turnham patents*. Muse is distinguishable from Bradley in that the belt conveyor is capable of carrying articles on past the cash register and checking position and does not necessarily bring the articles to a halt. Thus if the movement of the Muse conveyor belt is not properly regulated, articles may be carried past the checker without being checked. *The movement of the articles on the Muse check stand is still rectilinear in a straight line past the side of the cash register and there is no attempt or structure provided to cause the articles to move transversely toward the side of the cash register.*

Price 2,268,897 (R. pg. 391)

This patent discloses part of *an industrial packaging machine* designed to erect paper milk bottles from an irregular mass of the bottles and transfer them in erected position to a packaging or other processing mechanism. For this purpose the Price machine is provided with a large hopper 25 that obstructs approach to the front or side of the bottle advancing turn table 50. Other parts of the erected mechanism such as the gears 40 appearing in Fig. 1 of the patent obstructs approach to another side of the turntable. After being erected and advanced onto the turntable through the inlet throat and guide rails 57 the bottles are translated  $270^{\circ}$  in a continuous counter clockwise motion until they strike a curved deflection bar 59 extending across the turntable. This deflector bar 59 constantly directs the milk bottles to a discharge throat at the periphery of the turntable.

Not only is the function of the Price machine entirely foreign to check stands for supermarkets but the construction of the Price machine prevents any attempt to utilize the turntable 50 as a part of a check stand. No cash register or checking device is shown or needed by Price and no structure is provided for supporting such a cash register, if there were one, over the sector of the turntable along side of the deflector bar 59. Even if a cash register were so provided the obstructing hopper 25 and the narrow discharge throat 58 would render the device unfit for operation as a checkstand.



*Goodrich 1,071,004 (R. pg. 334)*

This patent discloses a packing table arranged to facilitate the packing of pieces of goods such as chocolates in containers. The table is thus employed for a use foreign to the checking of a grocery purchase. A fixed circular annular packing platform 3 provides packing space for a plurality of persons standing around the table. A rotating center portion 3A of the table is adapted to support and rotate boxes or bins of different styles or flavors of chocolates successively past the several packers so that each packer selects chocolates from successive supply boxes to form or assemble an assortment of chocolates in sales boxes.

No numerical checking or pricing of individual articles is required and no support is provided for holding a cash register over any part of the center rotating table 3A. In fact the provision of such a support would defeat the designed purpose of the turntable 3A as all supply boxes would then be stopped and would accumulate alongside of the cash register instead of continuing to rotate to help the packing function of the packers as mentioned by Goodrich.

*Florence 1,400,948 (R. pg. 352)*

This patent discloses a merchandising arrangement for stores and includes a rotating display device 16 with a plurality of tiered annular shelves 17. The circular shelves are positioned in an opening in a wall 3 of the store so that the shelves rotate through a rear storeroom where the shelves can be loaded and then advance past an arcuate fence where customers may stand to pick up any item which they may desire as it comes past. No attempt is made to check or regulate what the customer takes off of the rotating shelves and the customer brings and pays for the

selected articles at a *remote checkout counter 35*. No cash register or other checking device projects over any of the shelves 17 and indeed such a checking device would defeat the purpose of the Florence tables 17 as it would sweep all articles off of the table as they were advanced to the side of such a checking device. It would serve no useful purpose to position a checking device over one shelf for utilization in connection with other shelves because the display area of the one shelf over which the checking device was positioned would then become useless and reduce the capacity of the turntable as a whole. The operation of the Florence device is exactly opposite to the patented device. The customers take articles off the Florence device and carry them away instead of bringing them to the turntable and letting the turntable take the articles to the checker as in the device of the patent in suit.

### Novelty Acknowledged

Defendant appellees' expert repeatedly acknowledged and recognized the novelty and distinctive action of the patented checkstand in bringing articles *transversely* to the side of the cash register rather than moving the articles *longitudinally past* the side of the cash register. At R. pg. 167 it is stated:

“Q. Is there any disclosure in any of the prior art patents which you have referred to heretofore that discloses a checkout counter in which articles are carried arcuately around a turntable and against the side of a register support panel?

A. I would have to review all of the art but to *the best of my recollection there is no showing of that. \* \* \*.*”

and at R. pg. 170:

“Q. Mr. Sellers, do you recognize any advantage that might be achieved by causing the articles of a purchase to advance against the side of a cash register rather than longitudinally along and past the side?

A. Well, whether it be an advantage or not, if it advanced into the side and against the side of the cash register it would be stopped. *In the other instance, it would not be stopped.* Whether that would be an advantage or not is a question.”

and at R. pg. 173:

“A. Well, I think the art produced is the best evidence of that, but the primary distinction lies in the fact that the prior art did not include a rotatable turntable embodied in a stand per se. \* \* \*

Q. I believe you have answered this in a round-about way, Mr. Sellers, but would you state whether or not you can point to a single patent cited against the George patent that shows the combination claimed?

A. No. I think I have already answered that and stated that there is in the prior art a number of tables which were adopted to be incorporated there, but to the best of my recollection there is no one patent that actually shows it so positioned.”

See also the admissions by counsel in response to the question of the Court at R. pg. 240. “There can be no question but that the patent in suit is the first to teach the use of a rotatable turntable in a checkstand for self service stores.



### Combination Unsuggested

Not only is it admitted that the prior art does not show the use of a turntable in a checkstand but defendant appellees' expert recognized where the prior art failed to suggest the use of a turntable in the manner disclosed and claimed in the George patent in suit. See the testimony at R. pg. 180 where it is stated:

"Q. Mr. Sellers, you stated that in your opinion the Price patent 2,268,899 suggested the addition or substitution of a rotatable turntable to the belt type or sraight counter type check stand as shown in other patents.

A. *May I interrupt?* I don't believe, counsel, I said that. *I don't believe I said the Price patent suggested that substitution.*

Q. You stated, I believe, then, that the turntable of Price could be incorporated in the others, is that it?

A. That is correct.

\* \* \* \* \*

Q. Well in either case, wouldn't the turntable 50 of Price be positioned alongside of the cash register support panel just as the conveyor mechanism is in Bradley and Turnham?

A. It certainly would be adjacent the cash register.

\* \* \* \* \*

Q. Is there any suggestion or any requirement for the purposes of the Price machine that the articles conveyed be checked or recorded?

A. No."

### Improved Results Achieved by Patent in Suit

First and foremost, the patented checkstand advances the articles of a purchase to the checker in a new manner that greatly facilitates the checking operation. All parties to the suit agree on this improved result. See plaintiffs' Exhibits 13, 25, 30 and 31, (R. pgs. 270, 295, 298 and 299) in which all parties advertise a reduction of 25% to 33% in the number of checkstands needed. See also the statement of appellees' expert at R. pg. 173 that this reduction is a substantial saving. As is clearly illustrated in plaintiffs' exhibits 8 and 9 (R. pg. 261 and 262) all the articles placed on the turntable of the patent in suit are advanced arcuately to the same position immediately alongside of the cash register. This is the *common or assured checking position* previously referred to and the checker can rely on all articles reaching it. In their final movement they are moving transversely toward the cash register and checker and away from the customer. This has the advantage over belt type checkstands of the prior art of bringing all items of a purchase into the range of vision of the checker as he looks at the cash register and the immediately adjacent part of the turntable. As shown by the shaded areas of the two figures in Exhibit 8 all articles are visible on the patented checkstand while some at the outer side of the belt type checkstand are out of the range of the checker's vision unless the checker turns his head (R. pgs. 51-52).

A further advantage of the new direction of advance is improved reachability as pictured in plaintiffs' Exhibit 9. The checker can always reach automatically to the same common checking position on the stand. The normal swing of the checker's arm includes all the items on the turntable of the patented checkstand but does not reach the articles on the outside of the belt type checkstand and this is where

a great many of the articles are placed by customers in actual practice (R. pg. 54).

Another advantage of the new direction of approach of articles on the patented checkstand in suit is the ease with which the price of the article can be identified. Note that each article approaches almost directly toward the checker and along his line of vision, not sidewise across his vision. In this manner it is becoming progressively closer and clearer without transverse motion and it is easier to identify and read the price stamp or figure on the article than it is when the article moves longitudinally along the belt type checkstand and transversely past the checker (R. pg. 55). If a can or package is upside down and the price concealed, the checker knows it will come to him to be picked up and turned over. He does not have to lean out to get it.

All of the three preceding advantages or improvements of included vision, easy reachability and direct approach for easier pricing are especially important when it is considered that each function or operation occurs 10,000 or more times in a checker's working day (R. pg. 52-53).

A second improved result of the new line of motion of articles on the patented checkstand in suit is the definite reduction in the tendency of customers to slip or move articles past the checker without the article being checked (R. pgs. 239-240). On a belt type stand all the articles move longitudinally of the counter and transversely between the checker and the customer. It is quite common for customers, either with larcenous intent or with an honest but mistaken intent to help, to move articles to the rear of the counter before they have been checked. When the checker is busy with a large order these movements are often not detected and a loss to the store results. On the other hand, the turntable of the patent in suit moves articles directly away from the customer as she stands fac-

ing the checker and there is no need or excuse for the customer to take any article out of its normal path of travel toward the checker. In actual practice the purchasing public has shown no tendency to handle articles once they are placed on the turntable so the checker handles and checks all articles and losses to the store have been greatly reduced.

A third advantage of the rotatable turntable of the patent in suit is not described in the patent but nonetheless results from the structure shown. As appears most clearly from plaintiffs' Exhibit 7F and explained at R. pg. 49, instead of pushing her cart of groceries ahead of her along the front side of the counter of a belt type stand, the customer unloads her cart at the front of the turntable ahead of the cash register where she can stand beside of and reach the bottom shelf of the cart. She then disposes of the empty cart in an aisle behind the checker and has both hands free to handle her purse and receive change. Also articles cannot be left hidden on the lower shelf of the cart to be picked up and taken away without paying for them after passing the checker as can be done with the belt type stand where the customer retains control of her cart until she has passed the checker.

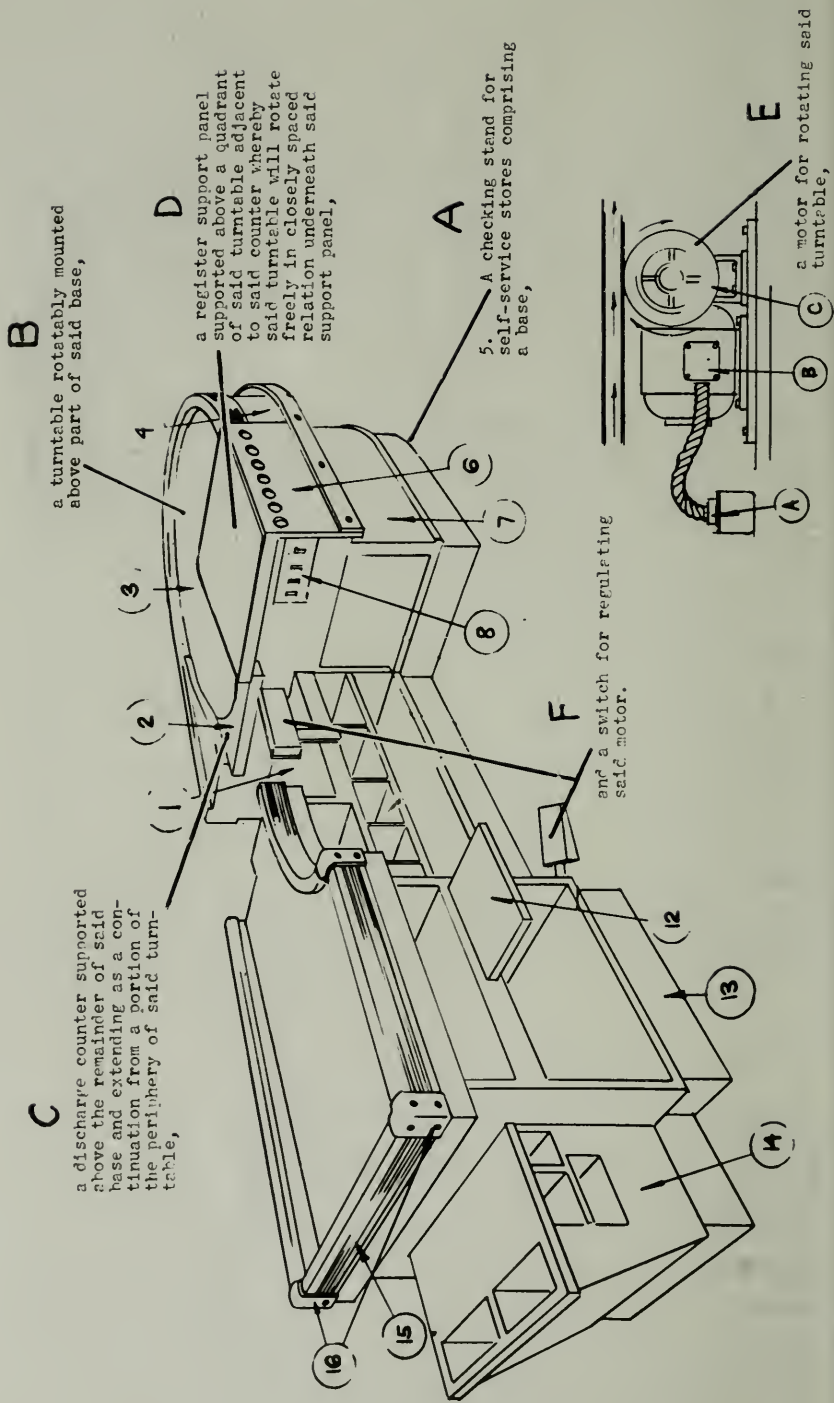
### Accused Devices

Three commercial structures of the defendant appellees, Check-A-Matic, are charged to infringe the patent. These are designated as models C-2 shown in plaintiffs' Exhibit 12, (R. pg. 269) and FD-5 shown in defendant Check-A-Matic Exhibit C (R. pg. 305) and C-3 shown in plaintiffs' Exhibit 32 (R. pg. 300). One commercial stand of the defendant appellee Du-More is charged to infringe and this is disclosed in defendant appellee Du-More's Exhibit D-1 to be submitted as a physical exhibit under Rule 16.





Claim 5 of the George patent  
applied to Check-A-Matic models C-2, C-3



*Check-A-Matic Models C-2, C-3*

For the convenience of the Court a picture of Check-A-Matic model C-3 check stand is reproduced on the opposed page with the separate elements of claim 5 of the patent in suit printed therearound and identified with portions of the check stand. The model C-2 is almost identical as will be pointed out. The stand includes a suitable base indicated by the note A over the forward end of which a rotatable turntable is mounted as indicated by the note B and reference numeral 3. Along the left rear sector of this turntable there is positioned a discharge counter conformed at its front end to the periphery of the turntable and extending over the remainder of the base as indicated by the note C and reference numeral 2. This stand as sold included a well or cutout portion 1 in the discharge counter designed to receive a weighing scale so that the platform of the scale is a flush continuation of the discharge counter 2. Positioned over the right rear quadrant or sector of the rotatable turntable is a generally rectangular support panel indicated by the note D. A motor indicated separately by the Note E is mounted in the base and connected to rotate the turntable B in a counter clock-wise direction so that articles placed on the turntable will be carried against the side edge of the register support panel, element D. Two switches, one operated by the checker's hip and the other by the checker's foot as indicated by the note F are provided for controlling the motor E and the turntable B.

In this C-3 stand the left edge of the register support panel D is inclined relative to a true radius of the turntable so that articles tend to travel rearwardly along the edge of the support panel to the discharge counter C. In the C-2 models of the stand the left edge of the register support panel was disposed along a true radius of the turn-

table. The distinction is submitted to be immaterial in view of the proper scope of the claims of the patent.

Speaking with reference to the distinction between the Check-A-Matic FD-5 model and the C-3 model before the Court, Check-A-Matic's attorney stated at R. pg. 79:

"There were a few of these stands (C-3) made and sold. *That we cannot deny. We are faced with that.* How it happened may come out. 'The current model (FD-5) is one in which this support panel is cut to fit the periphery of the rotating disc \* \* \*.' (Emphasis and explanation in parenthesis added.)

### *Check-A-Matic Model FD-5*

For convenience there is reproduced on the opposed page a picture of defendant appellee's Exhibit C showing the FD-5 model check stand with the elements required by claim 6 of the patent applying thereto. The check stand includes substantially the same base as the C-2 and C-3 described above and includes a rotatable receiving table indicated by note A. A stationary guard rail extends around the substantial portion of the receiving table as indicated by note B and a discharge counter indicated by note C is positioned with its forward end conformed to the left rear sector of the periphery of the receiving table, B. A stationary bar or arm projects forwardly from along side of the discharge counter to the center of the rotatable receiving table in closely spaced relation over the receiving table and constitutes means forming a stop for articles on the receiving table as indicated by note D. A register supporting panel having rectangular rear and side edges and a concavely curved front edge is positioned to the rear of the rotatable receiving table with its left end supported over the bar or article stop and with its concave edge care-



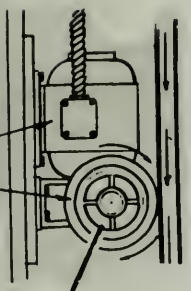
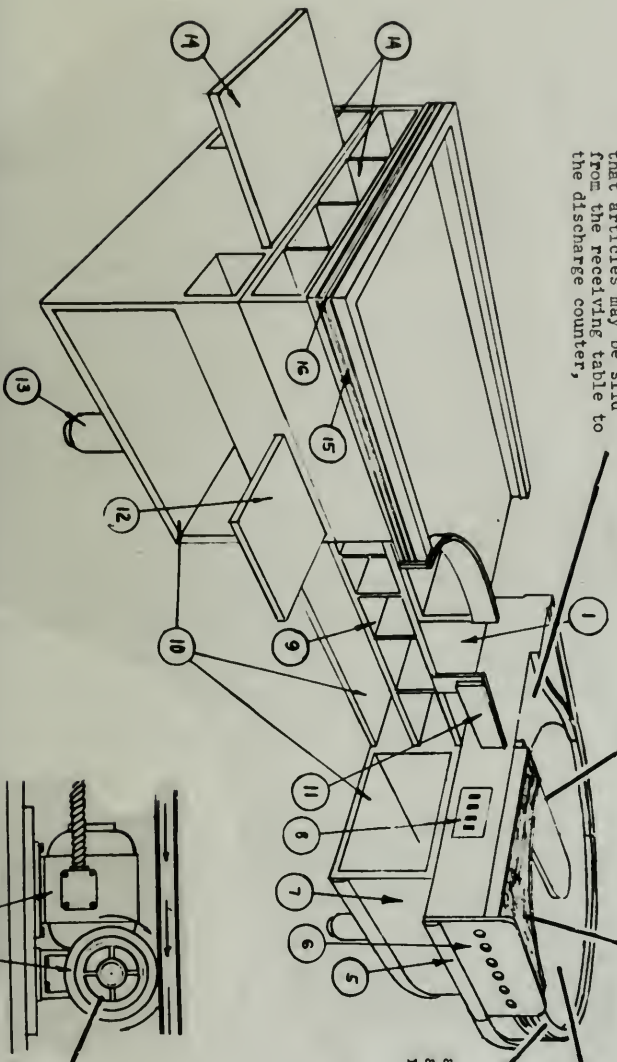
Claim 6 of the George patent  
 applied to Check-A-Matic model FD-5

**C** a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter,

**D** means forming a register support a stop for articles on the receiving — and — plane of said receiving table at the side of said stop,

**6.** An apparatus of the class described comprising a rotatable receiving table, **A**

**B** a stationary guard rail for a substantial portion of the rim of said receiving table,



**E** and means for rotating said receiving table.



fully maintained along the periphery of the rotatable receiving table. This constitutes a register support and is designed to support a cash register above the plane of the receiving table and at the side of the bar or stop as indicated by note D. A motor for rotating the receiving table is enclosed in the base.

In practice or use, the cash register is positioned on the cut away register support panel in overhanging relation to the rotatable receiving table. As is shown by testimony R. pg. 65-71 and by plaintiff appellants' Exhibits 10A, B, C and H (R. pg. 263-265), in many instances the overhanging of the cash register is so great as to cause the cash register to overbalance and tilt downwardly toward the rotatable receiving table and in order to counteract this tendency the user of the check stand interposes a block or wedge between the front left corner of the cash register. *The article stop and bar actually becomes part of the register supporting structure located over the rotatable receiving table.*

It is true that there is evidence that some check stands of this type are operated without any support and physical connection between the article stop or bar and the front edge of the cash register but this is submitted to be immaterial in view of the use and mode of operation to which the check stand is capable of being adapted and by which it is actually operated in the trade as noted in the preceding paragraph.

It should be noted that the left side edge of the article stop or bar extending over the rotatable receiving table in the FD-5 is inclined somewhat relative to a true radius of the receiving table so that there is a camming or feeding action of articles rearwardly along the side of the stop.

### Mode of Operation

In each of the C-2, C-3 and FD-5 Check-A-Matic models the customer approaches the front of the stand and places her purchases on the front of the rotatable receiving table. The checker actuates the turntable to advance the articles around to the article stop or bar and in the final feeding motion of these articles they are directed transversely of the check stand away from the customer to the same common checking position closely alongside of the cash register. The article stop and cash register prevent continued rotation of the articles and locate the articles closely alongside of the cash register for easy viewing and checking and removal to the discharge counter by the checker. Note that this function and mode of operation utilizes all of the motions and achieves all of the advantages of the patented George check stand. Note also the testimony of *defendant appellees' expert* at R. pg. 213 where it is stated:

“Q. As far the checker is concerned, would you say that there is any distinction in the functional properties of the C-2 and the FD-5 stands?

A. No. I think so far as the operator and the operation is concerned, they would function very much the same.”

Note the witness's further testimony at R. pg. 214:

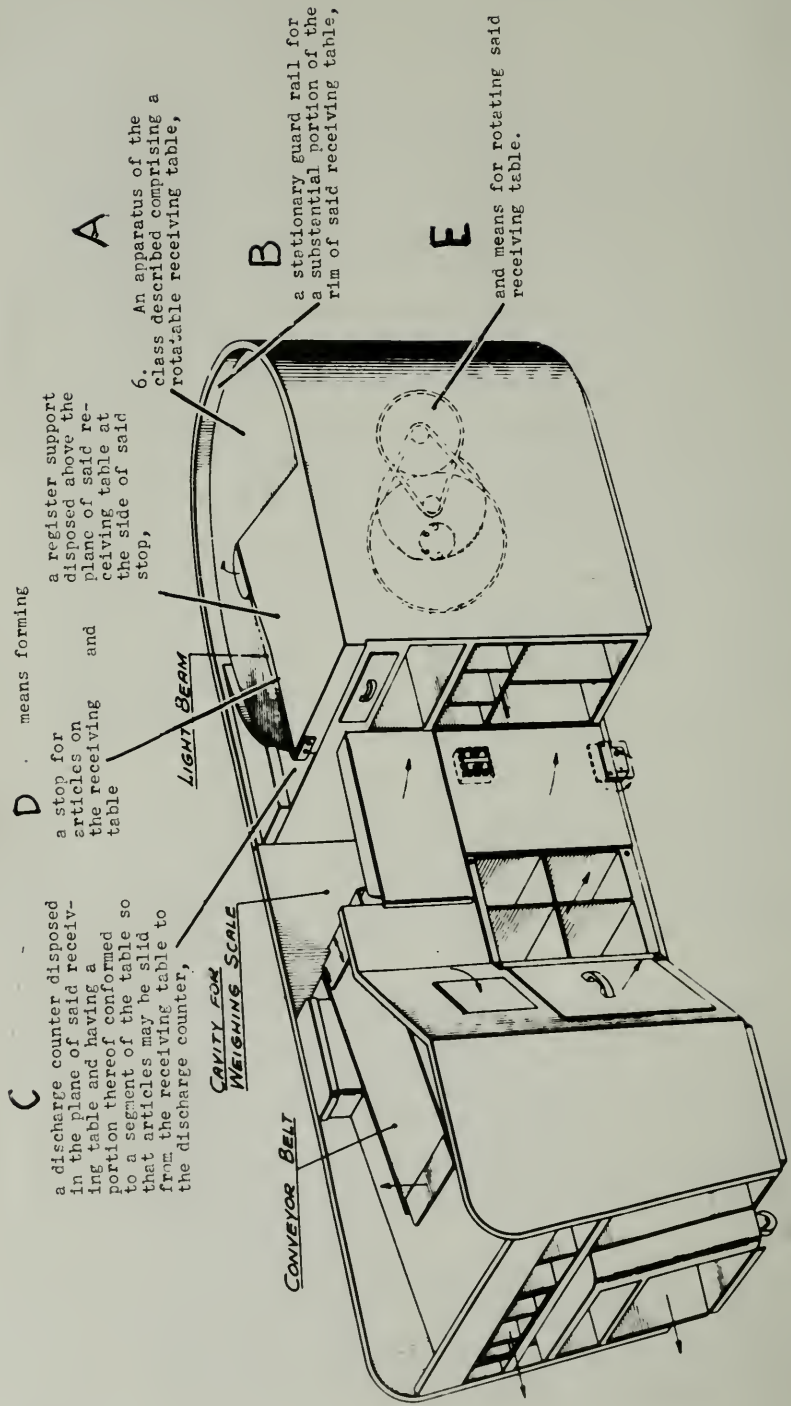
“Q. Is it not possible to operate each of the C-2 and FD-5 Check-A-Matic stands in exactly the same manner as the George or Spee-Dee check stand in that articles can be rotated close to the side of the cash register and intercepted manually before they reach the register?

A. That is correct.

Q. Is it not also possible to operate the George stand or the Spee-Dee commercial form thereof and the Check-A-Matic stand in identically the same manner in that articles may be rotated alongside



CLAIM OF THE GEORGE  
patent applied to Du-More



C

a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter,

D

means forming

a stop for articles on the receiving and the receiving table at the side of said stop,

A

6. An apparatus of the class described comprising a rotatable receiving table,

B

a stationary guard rail for a substantial portion of the rim of said receiving table,

E

and means for rotating said receiving table.



and against the stop and the turntable stopped for picking up the articles?

A. Well, I agree with that, except that rotation alongside. In the George patent construction, they are moved up against the stop and stopped, whereas in the Check-A-Matic construction, they are moved to that stop and by virtue of the inclination of the guide member, unless the table is stopped, they are moved laterally toward the discharge. *If the table is stopped, the net result is the same in each case."*

### ***Defendant Du-More's Structure***

Reproduced on the opposed page is a picture of defendant Du-More's Exhibit D-1 (Physical Exhibit) with the elements of claim 6 of the patent in suit applied thereto. The stand includes a rotatable receiving table shown by note A with a stationary guard rail shown by note B. A discharge counter indicated by note C is disposed in the plane of the receiving table with its forward end conformed to the left rear segment of the periphery of the receiving table. A generally rectangular register support panel is positioned over the right rear sector or quadrant of the receiving table with its left edge extending over the receiving table and alongside the forward end of the discharge counter C. A motor indicated conventionally at E is positioned in the base for rotating the receiving table.

The Du-More stand provides a light source or lamp adjacent the center of the rotatable receiving table that directs a light beam rearwardly in spaced relation along the side of the register support panel. The light beam actuates a photo-electric cell positioned at the rear edge of the register support panel and, in theory, articles rotated by the receiving table were supposed to intercept the light beam and actuate the photo-electric cell to turn off the motor E before the article actively engaged the side edge

of the register support panel. In actual practice it was shown that the overrun or inertia of the receiving table caused it to carry any article against the side of the register support panel after the power was turned off. Defendant appellee's expert explained this on direct examination (R. pg. 127) and it was confirmed by appellants' witness at R. pg. 89.

Regardless of the employment of the photo-electric cell, which is no more than a switch to control the motor as defined by claim 5, to automatically control the rotatable receiving table, the Du-More check stand still functions to receive the articles of the customer's purchase and rotate them around to a common checking position directly alongside of the cash register within easy view and reach of the checker. The final movement of the articles is transverse to the counter and away from the customer and no articles can escape the checker without being checked. The Du-More stand thus embodies and utilizes all of the essential structure and features of the George patent in suit, with the frill of an automatic electric eye added.

### **All Accused Devices Infringe**

Preceding pages 28A and 31A graphically apply claim 6 of the patent in suit to the Check-A-Matic FD 5 and Du-More stands. Page 27A applies claim 5 to the Check-A-Matic C-3 stand. Pages II to XIII of the appendix here-to similarly apply the remaining claims charged to be infringed to the accused stands.

### Analysis

It is submitted that the foregoing facts and relationships between the patented structure, the prior art and the accused structures fully support and require, as a matter of law, a finding of validity of the George patent in suit and infringement thereof by the accused devices. Appellants do not resort to or advance any novel or strained principles of law in order to support this contention but rely entirely on well recognized legal principles, definitions and tests of invention. As was pointed out at the beginning of the statement of facts, page 8, the device of the patent in suit is not complex but the simplicity of a structure has long been recognized as insufficient to support a finding of non-invention. In fact simplicity is the essence of true invention. As far back as 1850 the report of the Commissioner of Patents to the Senate for the year 1849 contained the following statement on page 419:

“Simplicity is the essence of true invention, and it is often interesting to see after a multitude of complicated inventions to attain a certain end, some discerning, or perhaps fortunate inventor, demolish a whole labyrinth of combinations, and arrive at the result by means so simple as almost to rob invention of its charms. Such means as one would suppose should have been the first and not the last resort. Mingled with the surprise are often times feelings of regret and chagrin by his competitors, that they had not discovered this most obvious path. To such cases the words of *Milton* are quite apropos:

“The invention all admired, and each how he  
To be the inventor missed; so easy it seemed,  
Once found, which yet unfound, most would  
have deemed  
Impossible!”

This quotation is certainly applicable to the present case. On the assumption that copies of this report are not generally available photostatic copies of the title page and quoted page 419 are attached as an appendix to this brief.

The reasoning of the above quotation is still sound and applicable over 100 years later and has been recognized recently by this court in the previously cited cases of *Muench-Kreuzer Candle Company v. Wilson*, 246 F. 2d 624 and *Patterson-Ballagh v. Moss*, 201 F. 2d 403. The true test of invention and patentability is submitted to have been stated by the Supreme Court in *Sinclair and Carroll Company v. Interchemical Corporation*, 325 U. S. 327 where it is stated,

“Under this test some substantial innovation is necessary, an innovation for which society is truly indebted to the efforts of the patentee.”

There can be no question in the present case but that the patentee George conceived and was allowed a patent on a check stand that was a material improvement over check stands of the prior art. It has frequently been held that the solution of a problem of long standing is the best evidence of an invention. *Baker-Cammack v. Davis* (C. A. 4) 181 F. 2d 550.

As has been pointed out, the case of *Atlantic and Pacific Tea Company v. Supermarket Corp.*, 340 U. S. 147 establishes the existence of a problem or need in the art for an improved check stand. That case was decided upon a patent filed in 1938 almost ten years prior to the application for the George patent here in suit and issued in 1941, six years prior to the George application. The decision indicates the great interest which the grocery trade expressed in any check stand purporting to be an improvement. The patentee, George, thus entered an active field



where others had tried and failed or at least had not succeeded to the degree which George succeeded. Nor did George utilize or rely on a newly discovered element or tool to gain his ends. He used the same means available to all his predecessors but added his touch of inventive skill to make a materially improved device. His success is attested to by great commercial acceptance and by the copying by at least the two appellee infringers.

It is pointed out that the Supermarket case did not in any way overrule or modify the above quoted portion of the 1850 report of the Commissioner of Patents or the Sinclair and Carroll case. It merely applied these old rules to the particular situation and facts involved and established an additional test of patentability relating to combinations of old elements. Appellants are perfectly willing and even urge that the rule of the Supermarket case be applied to the facts of this case in the same manner as this Court has already followed the case in the above cited Patterson-Ballagh and Muench-Kreuzer cases.

The Supermarket case laid down or rather restated the old requirement of a novel and unsuggested coaction between the elements of the device claimed. They defined novel coaction as a situation or relationship in which the end result, or the sum of the functions of the several parts of the device, was more than the sum of the individual elements thereof, considered separately. It is pointed out that the facts of the present case exactly fulfill these requirements as defined by the Supreme Court. At pages 13-14 *supra* it is pointed out in detail wherein the end result of the George stand is more than the sum of the separate functions of its parts. *Appellees can point to no part of the record that supports a contrary view.*

### Novel Coaction

The record in this case clearly shows that the turntable of the George checkstand coacts in a novel manner with the cash register support and article stop to advance the articles of a customer's purchase around from a remote unloading position always to the same checking position that is immediately alongside of the cash register. This positioning of the articles has multiple advantages in that the articles can be easily reached as well as viewed by the checker while the checker stands in facing and operating relation to the cash register. It also locates the articles where they are all easily movable from the checking position directly to the discharge counter. That is, the proximity of the turn table and cash register support to the discharge counter is important in order to permit full utilization of the articles advancing function of the turntable. The Court will appreciate that the turntable and cash register support of the George patent would be of little utility and certainly no improvement over the prior art if the discharge counter were not positioned with its forward end closely adjacent to the side of the cash register support. For instance, if the discharge counter were to extend from the right edge of the cash register support instead of the left, operation of the stand would be slowed to such an extent as to be unusable.

The record is complete with many instances pointed out above wherein the defendant appellees and their expert admitted the novelty of the George combination and *they cannot point to any portion of the record which supports a conclusion or finding that the prior art in any way suggests the combination claimed* or the highly desirable functions achieved by the combination. Where all prior belt type checkout stands moved articles longitudinally past the



side of the checker so that the checker had to continually turn his head while following the movement of the articles, the patented stand brings the articles around in a arc that is generally tangent to the checker's line of vision as he stands facing the cash register. Thus as shown in plaintiff appellants' Exhibit 8 and 9 the articles directly approach the checker and can be observed and reached without turning substantially as each successive article is identified and checked. Also the articles are all advanced to a common position within easy reach of the checker rather than staying on the outer or far side of a longitudinally moving belt type conveyor as is the case with a majority of articles placed on these belt conveyors (See R. pg. 107.)

### *Utility and Acceptance*

Defendant appellees can not contend that the check stand of the George patent is not useful and commercially successful. They have each adopted the essential features of the George stand and advertised and lauded its advantages to the public in their advertising. (See plaintiffs' Exhibits 13 and 30) (R. pgs 270 to 272 and 298). In the previously cited Patterson-Ballagh case this Court has properly held that the advertising of an infringer is properly considered by the court as proof of what the accused device does. In the case of *Coleman v. Holly Manufacturing Company*, 233 F. 2d 71, this Court further noted that the defendant's adoption of all of the essential parts of a patented device after it was proved commercially successful was indicative of the materiality of the improvements in the patented device.

### No Prior Art Anticipation

Still following the reasoning of the Patterson-Ballagh case, anyone contesting the validity of a patent has the burden of proving that invalidity, and *this appellees have not done*. Their own expert admitted that the patents he considered most pertinent, Price, Turnham and Bradley, suggested only the positioning of the Price turntable *along-side* of the cash register *but not partially under it* (R. pg. 181).

No art is cited by appellees that discloses anything pertinent not already considered by the Patent Office during the prosecution of the George patent in suit. Note that the Bradley and Price patents were cited by the Patent Office in the George application and that Turnham does not show anything not shown by Bradley. This fact in itself has been recognized as a cogent reason for refusing to overthrow the statutory presumption of validity of a patent. *Coleman v. Holly*, 233 F. 2d 71 and *Gomez v. Grant*, 177 F. 2d 266.

Note that the facts in this case are even more persuasive than in the Coleman case. There all elements of the patented device were found in the *identical art* of the patent (heaters) but here appellees have to go out of the check stand art into the remote art of industrial conveyors to find a turntable. They admit that George was first to put a turntable into a checkstand. No checkstand is cited which is adapted to have a wheel or turntable rotating partially under its cash register. *All checkstands and register supports cited by appellees have continuous supports all around that obstruct and prevent the positioning of a turntable partially underneath them*. Therefore, they cannot suggest or anticipate the positioning of a turntable partially underneath them.

*Invention Was Completely Adopted by Defendant-Appellees  
(i. e. Infringement)*

It has aptly been said by the Court Of Customs And Patent Appeals in the case of *In re Bisley*, 197 F. 2d 355 at [16-19] page 363 that:

“Moreover, the conception of a new and useful improvement must be considered along with the actual means for achieving it in determining the presence or absence of invention.”

Not only do defendant appellees fail to cite any art that discloses the concept of the patent in suit but they utilize all elements of the patented concept in their commercial structures. The completeness with which appellees adopted the concept of the invention is important because as restated in *Florence-Mayo Nuway Co. v. Hardy*, (C. A. 4) 168 F. 2d 778 at 782:

“The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think.”

The claims of the patent and the accused structures are of course the basic factors on which a determination of infringement or adoption of the patented concept will be determined. It is not necessary here to go into a prolonged analysis of these factors. *The expert witness of defendant appellees has done that for the Court.*

### *Du-More Infringement*

With respect to the accused structure of appellee Du-More reference is made to pages 131 to 145 of the record for a complete analysis *by defendant's expert on direct examination*, of the infringing character of the accused device. Excerpts of his analysis with reference to claim 6 are here reproduced:

“Q. \* \* \* would you identify the rotatable receiving table in the George patent?

A. That bears the reference character 6 \* \* \*.

Q. Do you find a corresponding part in the Du-More check stand?

A. It is also labeled turnable in Fig. 2 of the Exhibit D-1.

Q. \* \* \* a stationary guard rail for a substantial portion of the rim of said receiving table \* \* \*.

A. In the George patent, that rim surrounds the turntable 6, as shown in Figs. 1 and 2, and there is a functionally corresponding member shown in figures 1 and 2 of the Du-More construction illustrated in Defendant's Exhibit D-1.

Q. \* \* \* a discharge counter disposed in the plane of said receiving table and having a portion thereof conformed to a segment of the table so that articles may be slid from the receiving table to the discharge counter—\* \* \*

What is the corresponding structure in the Du-More device?

A. In the Du-More construction, the discharge counter unit could be said to be shown separate in Figure 2. It is moved over for the purpose of illustrating \* \* \*.

Q. \* \* \* means forming a stop for articles on the receiving table and a register support disposed above the plane of said receiving table at the side of said stop—

\* \* \* Do you find a similar or corresponding structure in the defendant Du-More's check stand?

A. In the Du-More check stand, there is a register supporting panel, so indicated in figures 1 and 2 of Exhibit D-1. There is an edge of the panel which, if needed, could perform the function of a stop. \* \* \*

Q. Finally claim 6 calls for

—means for rotating said receiving table—

Do you find such motors in both the George patent and the Du-More check stand?

A. Yes \* \* \*.”

### *Check-A-Matic Infringement*

The record does not contain such a clearly itemized statement of infringement by the model C-2 Check-A-Matic checkstands but attention is invited to the statement quoted on page 22 *supra* where the defendants' attorney said they would just have to live with the fact that they had made the stand. With reference to the current FD-5 stand the following comments of defendants' expert beginning at R. pg. 206 are illuminating:

“Q. Referring now to claim 6 and to the FD-5 check stand, do you find in the FD-5 check stand a stop means *to positively bring all articles to a stop* alongside the cash register?

A. That does not accurately define the Check-A-Matic construction in which the guide member, which is marked 17 in Exhibit C, functions to redirect the direction of travel of the moving articles from a circular movement into a more or less radial movement toward the discharge outlet.

Q. Then do you find means forming a stop for articles on the receiving table?

A. *In the sense of bringing articles to a stop, no.*”

This is the only comment of appellee Check-A-Matic in regard to the FD-5 stand and claim 6 of the patent. It attempts to interject into the claim an element of *absolute*



*stopping* but no such element appears in the claim. All elements of the claim are present as shown graphically on page 28A *supra*. Such minor changes in structure as Check-A-Matic have made in their FD-5 do not abandon or discard the functional concepts of the George stand and under the rule stated in *Graver Tank Co. v. Linde*, 339 U. S. 605, the FD-5 structure is the equivalent of the device patented to George. Infringers cannot practice a fraud on the patent by minor changes in structure.

The application of each claim, charged to be infringed, to the accused structures is graphically set out on pages II to XIII of the appendix to this brief.

The Court of Appeals of the Second Circuit has held it to be proper for an appellate court to pass on issues not decided by the trial court if the issues were fully presented, *Guide v. Desperak*, 115 U. S. P. Q. 156; 249 F. 2d 145.

## CONCLUSION

There is no question from a procedural standpoint but that this Court will reverse judgments of the District Court that are in error in law or in fact. The previously cited cases of *Coleman v. Holly* and *Muench-Kreuzer v. Wilson* each do that and it is submitted that the record in this case clearly establishes the following facts and errors in the District Court's decision.

1. Novelty of the patented George check stand is admitted. No one ever used a rotatable turntable in a checkstand before.

2. The utility of the George checkstand is not controverted in the record. Appellees, by their adoption of the



patented device and laudatory advertising thereof have admitted its utility and desirability.

3. Appellees do not submit any evidence controverting the evidence of new coaction between the elements of the patented device.

4. The George stand advances the articles of a customer's purchase in a new and advantageous manner to the checker.

5. There is new coaction of parts in the patented stand in that the cash register support panel not only supports the cash register but does so in a new relation to the article advancing turntable so that articles are intercepted alongside of the cash register rather than going past the register.

6. There is a coaction between the turntable, discharge counter, article stop and register support in that the turntable advances articles transversely across the end of the discharge counter, away from the customer and toward the stop alongside of the cash register into easy viewing and reaching position relative to a checker standing in front of the cash register support.

7. The parts or elements of the patented stand acting in concert do more than they would do separately. If the register support were not positioned to support the cash register over a sector of the turntable the articles would not be brought to the highly desirable common checking position closely alongside the cash register for easy checking and would not advance directly toward the checker for easier identification. If the article stop across the turntable were not located directly alongside the cash register and directly adjacent the front end of the discharge counter the articles could not be easily removed to the discharge counter after checking.

8. The accused devices, Check-A-Matic models C-2, C-3 and FD-5 and the Du-More turntable model, all utilize the essential elements and operational concepts of the patented check stand for the same purposes as the patented stand.

9. The prior art cited by appellees does not disclose any pertinent structure or relationship not shown by the patents cited and considered by the Patent Office during the prosecution of the George patent in suit.

10. The patented device has been adopted and commercially accepted by the trade.

11. The need for a more efficient check stand had been recognized in the trade for a long period of time but no one prior to the patentee had been able to recognize or conceive the advantages to be achieved by the combination claimed by the patent.

12. The prior art does not suggest the combination of the patent in suit and defendant appellees have not sustained the burden of proof necessary to overcome the presumption of validity of the patent.

13. The George patent 2,599,909 discloses inventive ingenuity and the patent and claims 3, 5, 7 and 9 thereof are valid.

14. The District Court was in error in holding that all of the components of the claimed invention were disclosed in the prior art of the patent in suit. There is no evidence that the art of check stands ever included a rotatable turntable and the art of industrial conveyors in which a turntable is found is too remote to suggest the use of a turntable in a checkstand, especially in the particular relation claimed.

15. The District Court was in error in holding the claims of the George patent in suit are directed to a non-patentable

aggregation of old elements because there is a definite novel and patentable coaction between the elements of the patented device.

16. The District Court was in error in holding that the functions of the various components of the disclosed invention are no different from the function of the same components in the prior art because there is no evidence in the prior art of a register support adapted to support a register over a sector of a turntable or conversely, no evidence of a turntable arranged to advance articles transversely across the end of a discharge counter to a stop or obstruction position alongside of a cash register support.

17. The District Court was in error in holding that the difference between the invention of the George patent in suit and the prior art was obvious because there is no evidence indicating where or how the prior art teaches the combination claimed.

18. The judgments of the District Court in both cases appealed, being unsupported in fact and based on improper or insufficient application of the legal tests of invention should be reversed.

19. The record discloses where all the facts necessary to support a finding of infringement of the George patent in suit by the Check-A-Matic models C-2, C-3 and FD-5, and the Du-More checkstand shown in defendants' Exhibit D-1, are either admitted or presented and not controverted and these accused devices should be held to be infringements.

20. George patent 2,599,909 and claims 3, 5, 6 and 7 thereof disclose and claim a meritorious improvement in the checkstand art that is unsuggested by the prior art and the patent and claims 3, 5, 6 and 7 thereof are valid.

The Court is respectfully requested to reverse the decisions of the District Court in both cases appealed and render a decision consistent with the foregoing facts, including a determination of the infringing character of the accused devices.

Respectfully submitted,

WILLIAM T. ALVARADO SALES Co.,  
SPEE-DEE CHECKOUT SYSTEMS, INC.,  
By EARL & WEBB,  
*Attorneys for Plaintiff-  
Appellants.*

FRED H. MILLER,  
HAZARD & MILLER,  
*Of Counsel.*

# APPENDIX

## I.

### TABLE OF EXHIBITS

References to pages of Transcript  
of Proceedings in Trial Court

	Identified	Offered	Received
For Plaintiffs			
1 .....	13	156	157
2 .....	13	156	157
3 .....	17	17	17
7A-7F .....	30	33	33
8 .....	33	38	38
9 .....	39	41	41
10 A, B.....	68	81	81
10C .....	69	81	81
10 H .....	72	81	81
11 .....	184	184	185
12 .....	184	185	185
13 .....	184	185	185
14 .....	184	185	185
15 .....	184	185	185
16 .....	184	185	185
19 .....	184	185	185
20 .....	184	186	186
25 .....	184	186	186
26 .....	184	186	186
30 .....	315	315	315
31 .....	335	336	336
32 .....	356	356	356
For Defendant Check-A-Matic			
A .....	121	123	187
B .....	121	122	122
C .....	122	123	123
D .....	122	123	123
E-2, 3, 4, 5, 6, 7, 8	365	372	372
For Defendant Du-More			
A .....	210	214	215
C .....	255	255	255
E .....	425	429	429









# III.

**B**  
a turntable rotatably mounted  
above part of said base,

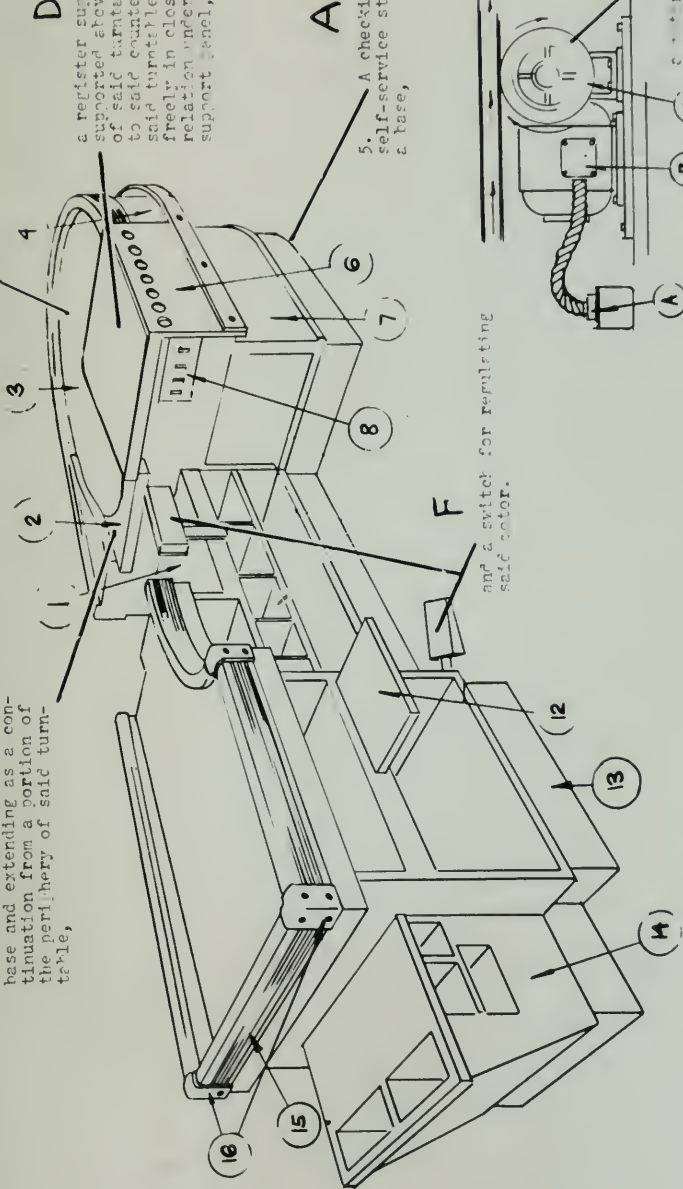
**D**  
a register support panel  
supported above a quadrant  
of said turntable adjacent  
to said counter whereby  
said turntable will rotate  
freely in closely spaced  
relation underneath said  
support panel,

**A**  
5. A checking stand for  
self-service stores comprising  
a base,

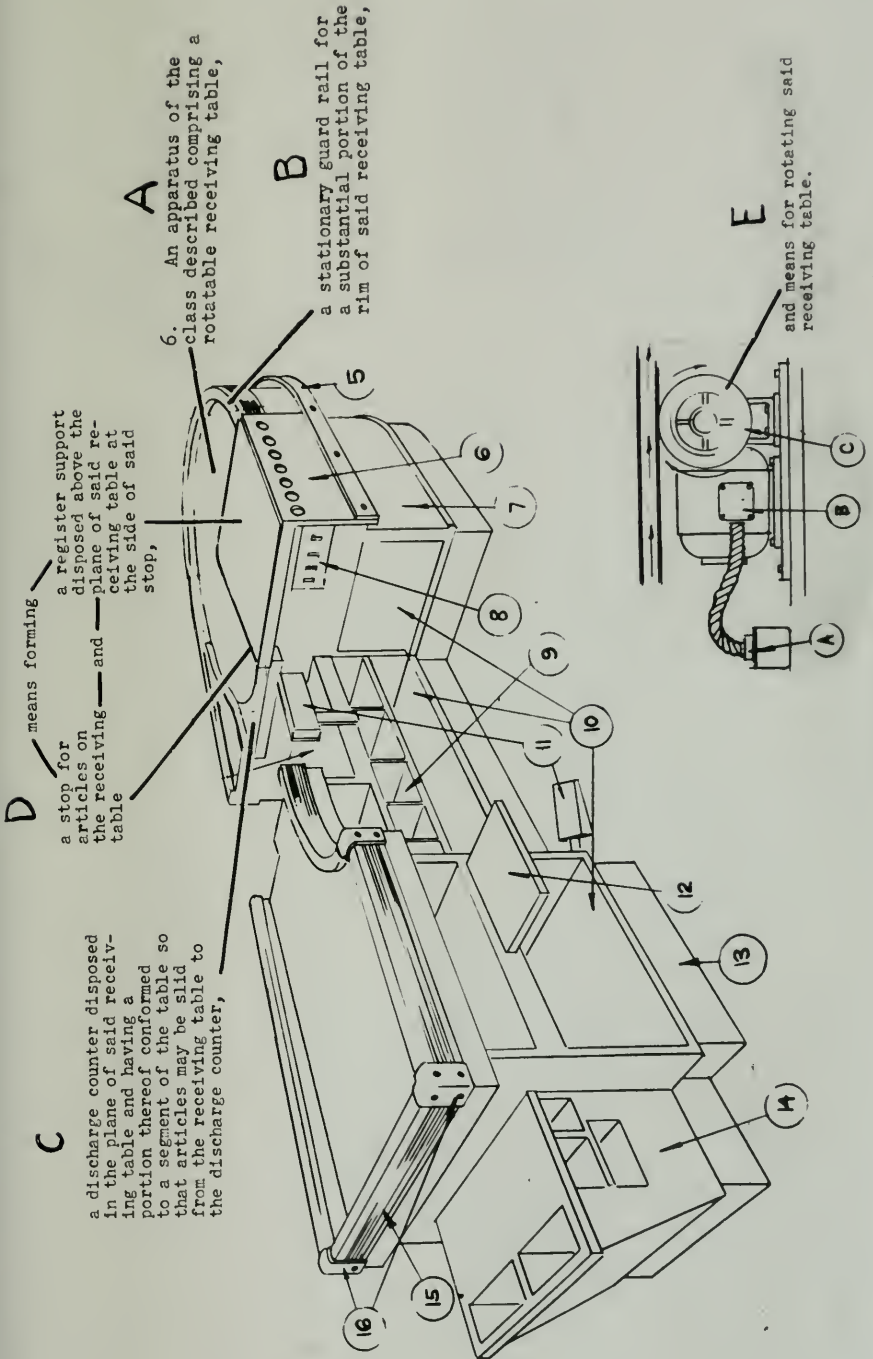
**E**  
a motor for rotating said  
turntable,

**C**  
a discharge counter supported  
above the remainder of said  
base and extending as a con-  
tinuation from a portion of  
the periphery of said turn-  
table,

**F**  
and a switch for regulating  
said motor.





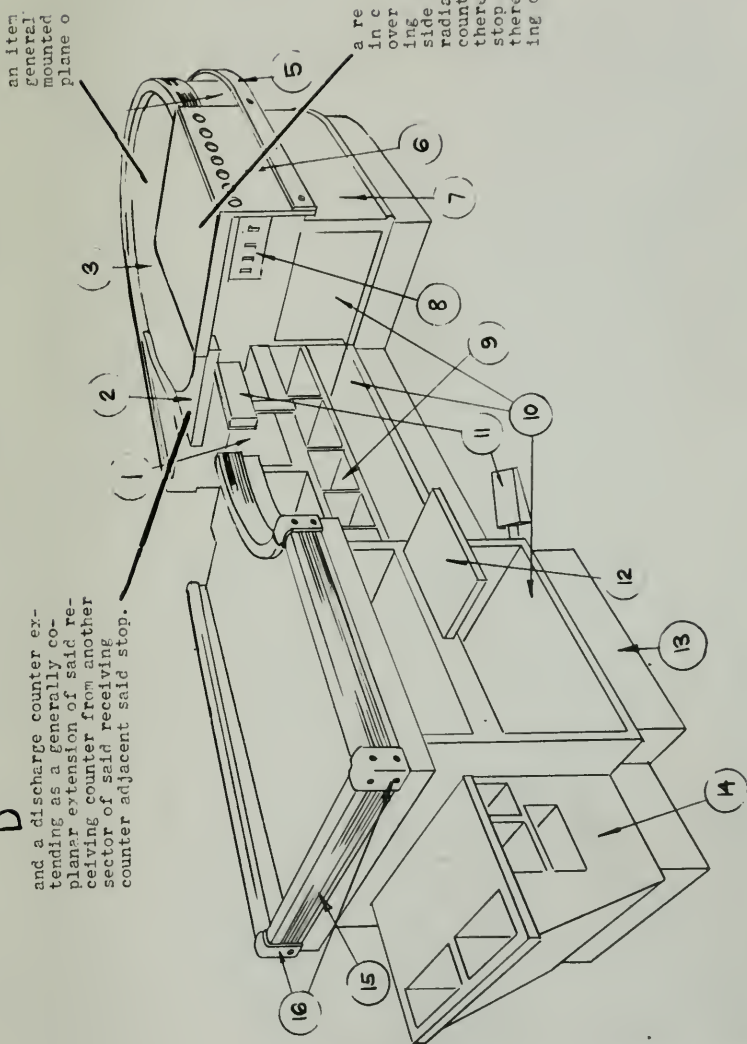






7. A checking stand for self-service stores comprising,

D and a discharge counter extending as a generally coplanar extension of said receiving counter from another sector of said receiving counter adjacent said stop.



V.



3. A checking stand for a grocery store and the like comprising a register support panel having a stop portion along one edge thereof,

to said support panel,

D

the end of said discharge counter extending from said stop portion arcuately away therefrom for a substantial distance along the periphery of said turntable,

E

said discharge counter extending longitudinally from said end with its inner edge concavely arcuate with respect to said support panel,

B

a turntable mounted to rotate partially underneath said panel whereby articles placed on said turntable will be carried thereby against said stop portion,

F

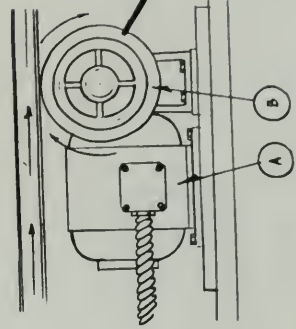
a guard ring around the exposed edge of said turntable and extending inwardly over the outer edge of said discharge counter to direct items on said table toward said stop portion,

H

and means for controlling said motor located behind said discharge counter for operation by the operator of said stand.

G

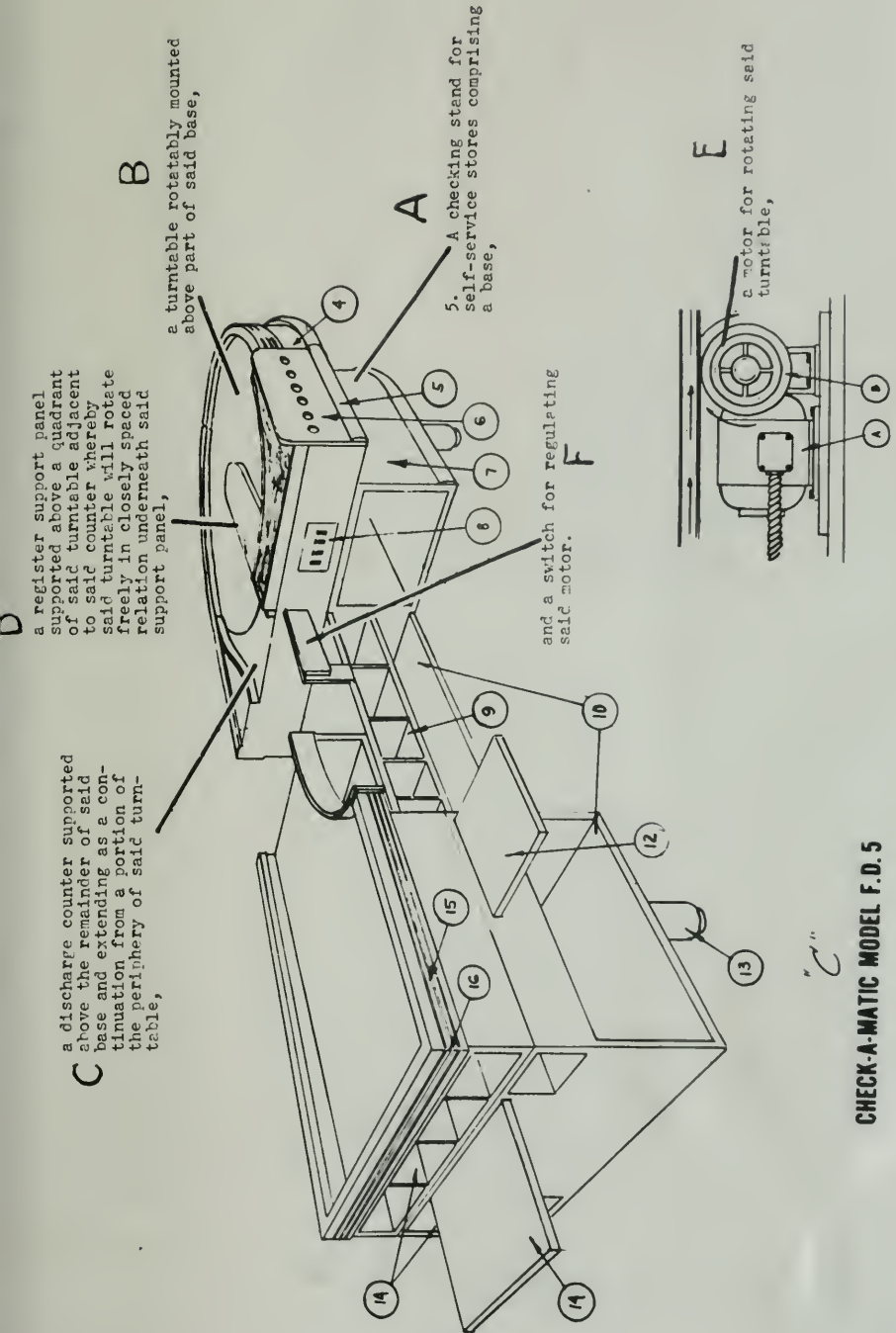
a motor for rotating said turntable,



CHECK-A-MATIC MODEL F.D. 5

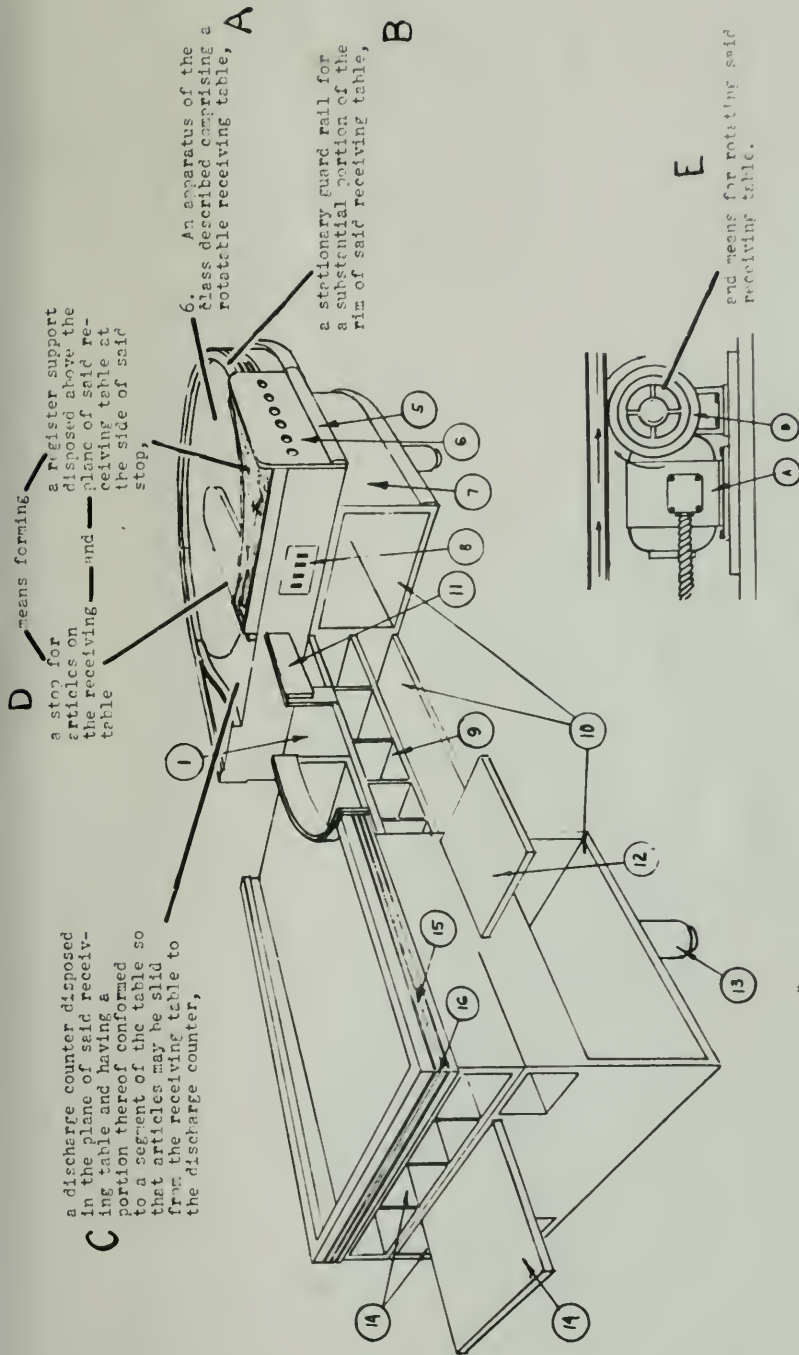
"C"













7. A checking stand for self-service stores comprising,

D

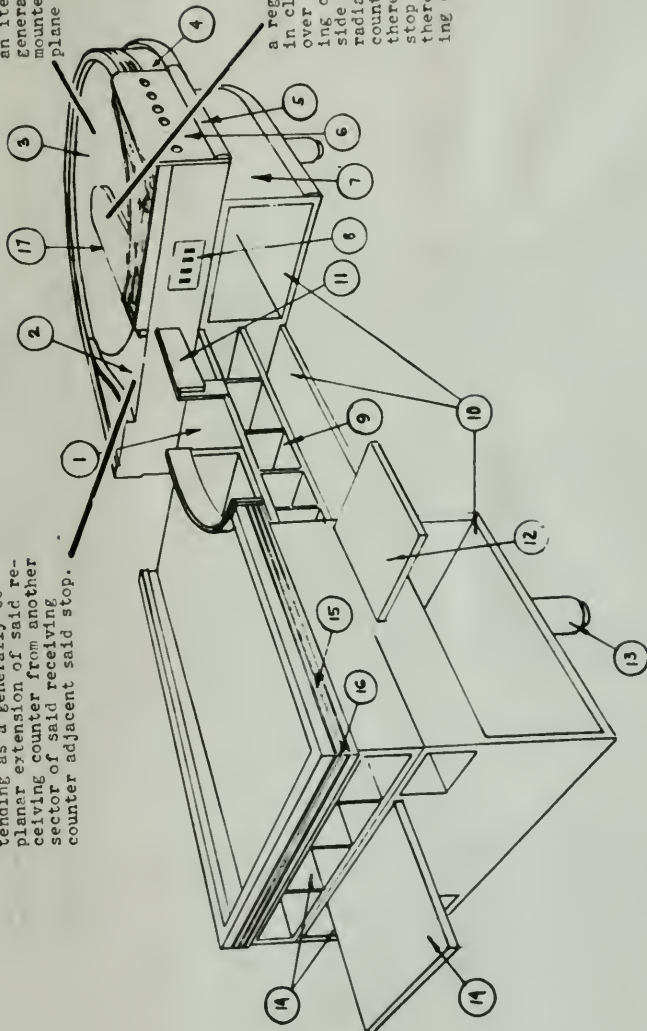
and a discharge counter extending as a generally coplanar extension of said receiving counter from another sector of said receiving counter adjacent said stop.

an item receiving counter of generally circular outline mounted to rotate in the plane of its surface,

B

a register support positioned in closely spaced relation over a sector of said receiving counter and having a side edge extending generally radially of said receiving counter to the periphery thereof to form an article stop for articles rotated thereagainst by said receiving counter,

C



CHECK-A-MATIC MODEL F.D. 5



C

a discharge counter extending from said turntable adjacent to said support panel,

A

3. A checking stand for a grocery store and the like comprising a register support panel having a stop portion along one edge thereof,

B

a turntable mounted to rotate partially underneath said panel whereby articles placed on said turntable will be carried thereby against said stop portion,

F

a guard ring around the exposed edge of said turntable and extending inwardly over the outer edge of said discharge counter to direct items on said table toward said stop portion,

X

G

a motor for rotating said turntable,

H

and means for controlling said motor located behind said discharge counter for operation by the operator of said stand.

D

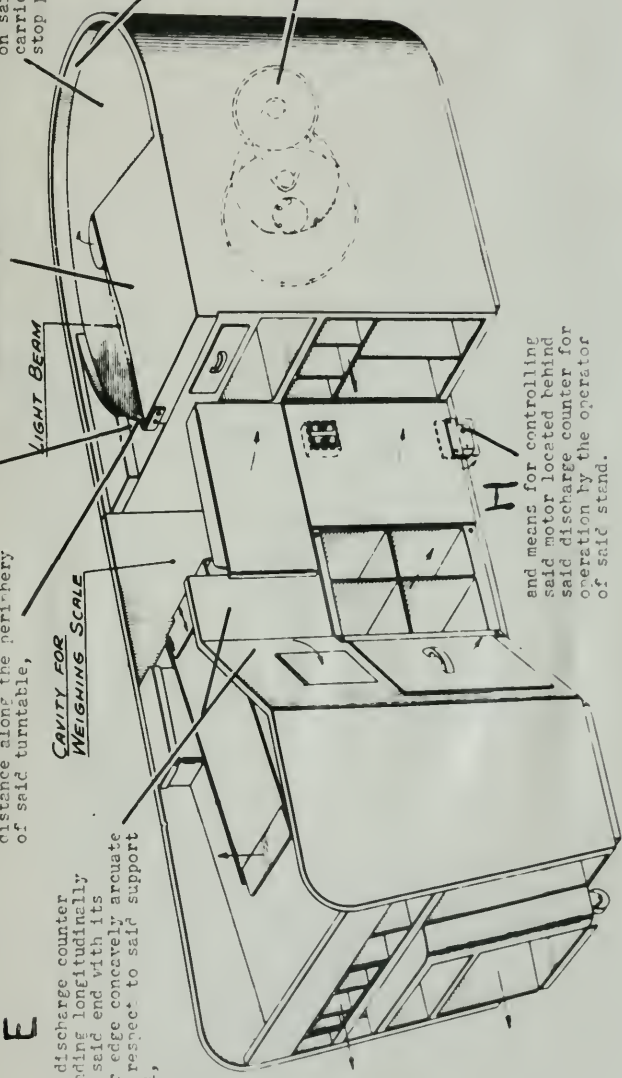
the end of said discharge counter extending from said stop portion arcuately away therefrom for a substantial distance along the periphery of said turntable,

CAVITY FOR WEIGHING SCALE

E

said discharge counter extending longitudinally from said end with its inner edge conceavely arcuate with respect to said support panel,

LIGHT BEAM







C  
 a discharge counter supported above the remainder of said base and extending as a continuation from a portion of the periphery of said turntable,

B  
 a turntable rotatably mounted above part of said base,

LIGHT BEAM

CAVITY FOR WEIGHING SCALE

CONVEYOR BELT

E

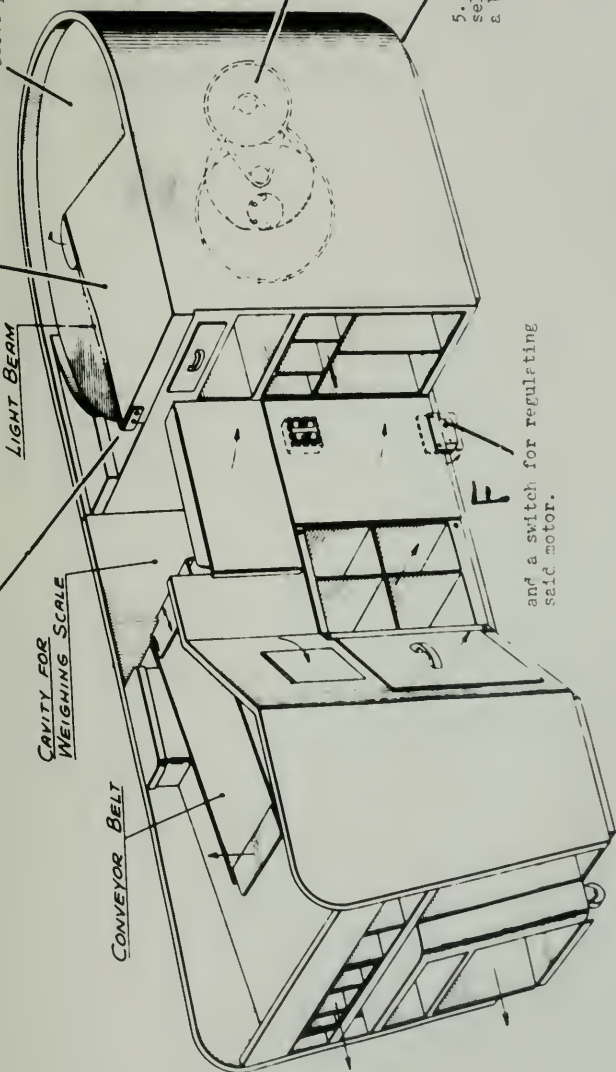
a motor for rotating said turntable,

A

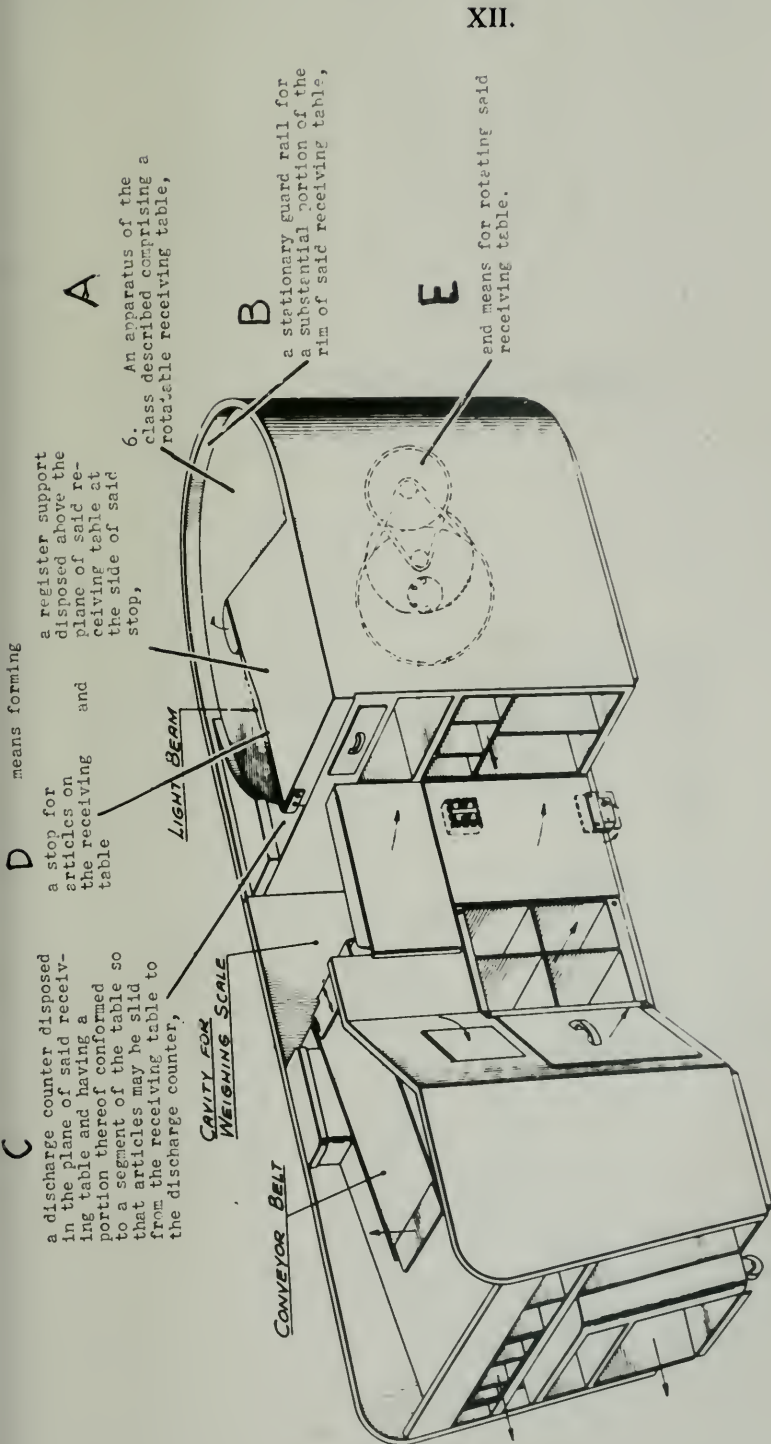
5. A checking stand for self-service stores comprising a base,

and a switch for regulating said motor.

F









**A** A checking stand for self-service stores comprising,

**D** and a discharge counter extending as a generally coplanar extension of said receiving counter from another sector of said receiving counter adjacent said stop.

**B** an item receiving counter of generally circular outline mounted to rotate in the plane of its surface,

REGISTER SUPPORT PANEL

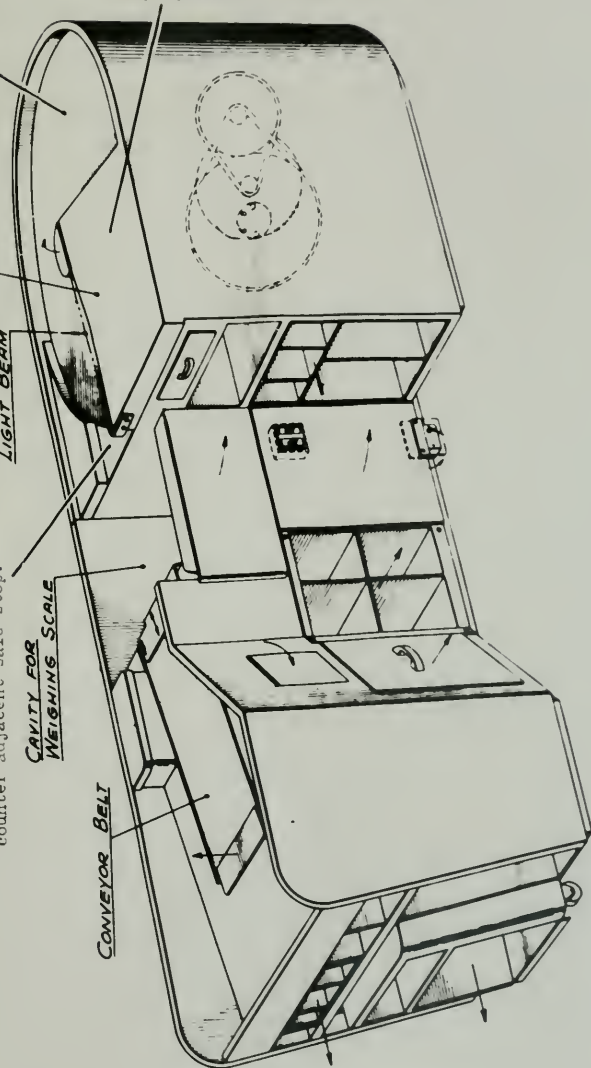
LIGHT BEAM

CAVITY FOR WEIGHING SCALE

CONVEYOR BELT

**C**

a register support positioned in closely spaced relation over a sector of said receiving counter and having a side edge extending generally radially of said receiving counter to the periphery thereof to form an article stop for articles rotated thereagainst by said receiving counter,







# REPORT

OF THE

## COMMISSIONER OF PATENTS,

FOR

### THE YEAR 1849.

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#### PART I.

#### ARTS AND MANUFACTURES.

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#### CONTENTS.

- I. FINANCES AND STATISTICS OF THE PATENT OFFICE.
- II. INVENTIONS AND CLAIMS.
- III. EXAMINERS' AND MACHINIST'S REPORTS.
- IV. ORIGIN AND PROGRESS OF INVENTION.
- V. THE MOTORS: CHIEF LEVERS OF CIVILIZATION.
- VI. PROPOSED APPLICATIONS OF THE PATENT FUND.—1. PUBLICATION OF SPECIFICATIONS: 2. PREPARATION OF A GENERAL, ANALYTICAL AND DESCRIPTIVE INDEX OF INVENTIONS: 3. INSTITUTION OF NATIONAL PRIZES.
- VII. HISTORICAL NOTICES OF INVENTIONS, FROM ARCHIVES OF THE STATES.
- VIII. ON THE PROPULSION OF STEAMERS.



Simplicity is the essence of true invention, and it is often interesting to see after a multitude of complicated inventions to attain a certain end, some discerning, or perhaps fortunate inventor, demolish a whole labyrinth of combinations, and arrive at the result by means so simple as almost to rob invention of its charms. Such means as one would suppose should have been the first and not the last resort. Mingled with the surprise are often times feelings of regret and chagrin by his competitors, that they had not discovered this most obvious path. To such cases the words of Milton are quite apropos :

“The invention all admired, and each how he  
To be the inventor missed ; so easy it seemed,  
Once found, which yet unfound, most would have deemed  
Impossible !”

Such cases are the most embarrassing to your examiners. If measured by the length and breadth of novelty, little is to be found, while yet the measure of utility has in no way been made to appear. But to return to the churns.

A modification of the last named churn has been patented, in which the hole in the dasher at the lower part was large enough to contain a solid plunger, fitting loosely within the dasher, which acts the part of a second valve. There have been also several patents granted for ingenious forms of rotary atmospheric churns. These inventors crowded upon the office so numerous, that they were examined with the most rigid scrutiny, and on several occasions, actual demonstrations by experiment of making butter, was required of the applicants, to satisfy the office that the inventions claimed justified their pretensions to be real improvements. In most of these cases, the results were unfavorable to the inventor ; but in some, patents were ordered to issue. On one occasion an experiment was performed (humorously characterized by a bystander as a “churn race,”) between a patented and a new churn, in which they both came out alike, making butter from new milk in two minutes and a half. Such a rapid separation of the butter, however, is by no means desirable, although this is the general aim of these improvements. We have it upon the highest chemical authority, that butter made so rapidly is not likely to be so good as that which is made slowly.

The above is a brief view of such patented inventions as have seemed to me to be notable among the many referred to me for examination during the past year.

Respectfully submitted,

CHAS. G. PAGE, *Examiner.*



ADDED ADMISSION FROM RECORD

Appellants call attention to the admission by counsel for appellee Du-More appearing at page 458 of the original Transcript of Proceedings in the District Court. This admission was inadvertently omitted from the parts of the record designated to be printed by appellants and is as follows:

“The Court: It is agreed that plaintiff here, that the George patent is the first one that put the cash register in that place?

Mr. Latta: In a checkstand?

Mr. Kriegel: No generally. I would agree in a check stand George was the first one that put a panel over a quadrant of the turntable.”

Counsel for appellants apologize for the oversight in not printing this portion of the record and call attention to the same now only in support of the admission of novelty appearing at page 240 of the printed record where both defense counsel admitted the novelty of the George checkstand with reference to the use of a turntable. It thus appears from the record that George was not only the first to put a turntable in a checkstand but was also first to put a panel for supporting a cash register over the turntable.



